Supreme Court, U.S.
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No. 07-137

In The
Supreme Court of the United States

THOMAS H. BARANOWSKI,

Petitioner,

v.

LARRY HART, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a regulation that forces an inmate to forfeit his regular Sabbath group worship if he cannot secure the presence of a Rabbi or prison-approved outside volunteer constitutes a "substantial burden" under the Religious Land Use and Institutionalized Persons Act.

PARTIES TO THE PROCEEDINGS

The petitioner in this Court is Thomas H. Baranowski.

The respondents are Larry Hart, Unit Chaplain, Huntsville Unit, Texas Department of Criminal Justice; Bill Pierce, Director of Chaplaincy Department, Texas Department of Criminal Justice; Lawrence Hodges, Warden, Huntsville Unit, Texas Department of Criminal Justice; and Douglas Dretke, Director of the Correctional Institutions Division, Texas Department of Criminal Justice.

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BRIEF FOR PETITIONER

Petitioner inmate respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 486 F.3d 112 (5th Cir. 2007), and is reproduced in the Appendix at App. A. The opinion of the district court is reported at 2005 U.S. Dist. LEXIS 36231 (S.D. Tex. July 15, 2005), and is reproduced in the Appendix at App. B.

JURISDICTION

The court of appeals entered its judgment on May 4, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISION

The portion of the Religious Land Use and Institutionalized Persons Act relevant to this petition is 42 U.S.C. § 2000cc-1(a):

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

STATEMENT

Petitioner Thomas H. Baranowski seeks review of the Fifth Circuit's interpretation of the term "substantial burden" as used in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a). The panel held, incorrectly, that the Texas Department of Criminal Justice ("TDCJ") regulation which forced Baranowski to forfeit his regular Sabbath group worship did not constitute a "substantial burden" on Baranowski's religious exercise.

In reaching its holding, the panel did not examine the particularized effect of the TDCJ regulation on Baranowski's religious exercise. Instead, the panel relied on a prior Fifth Circuit case, *Adkins v. Kaspar*, which also refused to engage in an adherent-based analysis in determining whether the burden placed on a prisoner's religious exercise by the TDCJ regulation at issue was substantial. 393 F.3d 559, 570 (5th Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005).[1] This approach differs from that of other circuits, and circumvents the wording and intent of the statute. *See Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir.

[1] The panel noted that the facts in *Baranowski* are not materially different from those in *Adkins*. *See Baranowski v. Hart*, 486 F.3d 112, 121 (5th Cir. 2007) ("We reach the same result in the instant case . . . on facts that are not materially different from *Adkins*.").

2006); *[illegible]tt v. R.I. Dep't of Corrs.*, 482 F.3d 33, 38 (1st Cir. 2007); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1227-28 (11th Cir. 2004).

The court of appeals buttressed its conclusion by suggesting that any burden to Baranowski's religious exercise was caused most directly by a "dearth of clergy and authorized volunteers," and only indirectly by the prison regulation which required the presence of such volunteers. Although this "direct/indirect" analysis arguably comports with that of another circuit, it conflicts with this Court's doctrine. *Compare Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004); *with Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Review Board*, 450 U.S. 707, 718-19 (1981).

Petitioner Thomas H. Baranowski is a practicing Jewish prisoner confined by the TDCJ. App. B at 24. Baranowski, like other observant followers of Judaism, is obligated to attend congregational services every Friday evening. TDCJ prison regulations require the presence and direct supervision of either the unit Chaplain or an "approved religious volunteer" for any meetings of a religious nature, including these Sabbath congregational services. App. B at 32. On September 5 and 12, 2003, as well as October 3 and 10, 2003, Baranowski's unit did not sponsor any Jewish Sabbath services because a Rabbi or qualified volunteer was not available. App. B at 32. Baranowski claims, *inter alia*, that his inability to assemble on every Sabbath and every Jewish holy day "substantially burdens" the practice of his religion, in violation of RLUIPA.

On July 15, 2005, the United States District Court for the Southern District of Texas held that the Defendants had not substantially burdened Baranowski's religious exercise, noting that "on the days [Baranowski] claims no Friday evening services were provided, no rabbi or approved religious volunteer was available to lead the services. [Baranowski] does not submit any summary judgment evidence that defendants turned away an available rabbi or approved religious volunteer for those services." App. B at 38. The district court cited *Adkins* for support, noting that government action does not create a substantial burden on religious expression if it "merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed." App. B at 38 (citing *Adkins*, 393 F.3d at 570).

The Fifth Circuit affirmed the district court, and found that the TDCJ regulation that precluded Baranowski from engaging in group worship on the Sabbath did not place a substantial burden on his religious exercise. Like the district court, the Fifth Circuit panel relied on *Adkins* for support. *Baranowski*, 486 F.3d at 124-25. The Fifth Circuit has now twice held that the requirement of an outside volunteer for all religious assemblies does not place a substantial burden on the religious exercise of inmates, whether or not that requirement effectively results, under the particular circumstances at issue, in a complete ban on group worship.

REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit's Application of the RLUIPA "Substantial Burden" Standard Is Inconsistent With the Approach of Other Circuits.

The Fifth Circuit's application of the "substantial burden" standard in *Baranowski* and *Adkins* is inconsistent with the approach taken in other circuits – in both Fifth Circuit cases, the analysis did not turn on the actual, particularized effect of the government regulation on the adherent. In *Adkins*, the court conceded that Adkins was prevented from congregating on many holy days. 393 F.3d at 571. The panel nevertheless concluded that the prerequisite mandated by the prison – the attendance of an outside volunteer – did not place a substantial burden on Adkins's religious exercise. *Id.* Significantly, it reached this conclusion without considering whether Adkins could actually find an outside volunteer for every holy day or Sabbath. *Id.* The court considered the same TDCJ regulation in *Baranowski*, and again, without considering whether Baranowski could find an outside volunteer for each Sabbath and holy day, found no substantial burden on his religious exercise. 486 F.3d at 124-25.

A close review of *Adkins* explains the results in both cases. On the surface, the legal test enunciated in *Adkins*, and quoted in *Baranowski*, is not worlds away from the tests used in some other circuits – "a government action or regulation creates a 'substantial burden' if it truly pressures the adherent to significantly modify his religious

behavior and significantly violates his religious beliefs." 393 F.3d at 570.[2] However, the *Adkins* panel continued:

> And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs. **On the opposite end of the spectrum, however, a government action or regulation**

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[2] It is significant, however, that the six circuits to address the issue have propounded differing definitions for "substantial burden" under RLUIPA. In *Midrash Sephardi*, the Eleventh Circuit held that "an individual's exercise of religion is 'substantially burdened' if a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion." 366 F.3d at 1227. The Ninth Circuit, in *San Jose Christian College*, held that a substantial burden results from the imposition of a "significantly great restriction or onus on any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004). In *Murphy*, the Eighth Circuit defined substantial burden to include regulations that "significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs," "meaningfully curtail a person's ability to express adherence to his or her faith," or "deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion." *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir. 2004). In *Lovelace*, the Fourth Circuit held that a substantial burden "occurs when a state or local government, through act or omission, 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" 472 F.3d at 187 (quoting *Thomas*, 450 U.S. at 718). The First Circuit, in *Spratt*, adopted the *Lovelace* test. *Spratt*, 482 F.3d at 38. These varying definitions further demonstrate the need for this Court's guidance and clarification on the correct standard for determining whether a burden is "substantial" under RLUIPA.

> **does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.**

Id. (emphasis added).[3] The panel in *Adkins* focused on the equal application of the regulation, rather than the particularized effect of the regulation on the adherent, in determining that no substantial burden existed.[4] Thus, because unsupervised group worship was not "generally available," the restriction of such worship did not constitute a "substantial burden" under RLUIPA. *Id.* at 571.

The *Baranowski* panel also held that the regulation at issue did not constitute a substantial burden without determining the particularized effect of requiring an outside volunteer on Baranowski's ability to participate in group Sabbath worship. 486 F.3d at 124-25. For example, the panel did not analyze the burden of foregoing group Sabbath worship in light of Baranowski's individualized religious beliefs, nor did it recognize the particular difficulty of finding willing outside volunteers – which may be

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[3] As noted earlier, the *Baranowski* district court relied on this section of *Adkins* in determining that Baranowski had not shown a substantial burden. *See* App. B at 38.

[4] *See id.* at 571 ("With the exception of Muslims who are subject to a special court order, every religious group at [the prison] is required to have a qualified outside volunteer on such occasions. . . . The requirement of an outside volunteer . . . is a uniform requirement for all religious assemblies at [the prison] with the exception of Muslims. . . . We admit some lingering concern about the prison authorities' refusal to [allow a certain couple to act as volunteers] . . . which in turn prevents YEA members from congregating on the same basis as other similarly situated groups.").

significant, considering that such volunteers who are practicing Orthodox Jews cannot travel from sundown Friday to sundown Saturday, and thus must stay in the prison (or within walking distance) to participate in Sabbath worship. Instead, the panel noted that it considered a similar regulation in *Adkins*, and applied its holding, without considering any particularized differences in Baranowski's and Adkins's situations. Under the *Baranowski* and *Adkins* analysis, then, the nature of the regulation is the deciding factor, not the effect of the regulation on the adherent's religious exercise.

In contrast, other circuits consider the actual, particularized effects on the adherent in determining whether a prison regulation creates a substantial burden on the adherent's religious exercise. For example, in *Lovelace*, the Fourth Circuit first considered the particular religious beliefs of the affected inmate, and then determined that the prison policy at issue actually restricted his religious exercise, as it prevented him from fasting during daylight hours or participating in organized religious services. *See* 472 F.3d at 187 ("[The dissent] overlooks the fact that the policy works to restrict the religious exercise of any [Nation of Islam] inmate who cannot or does not fast, but who still wishes to participate in group services or prayers.") In *Spratt*, an inmate desired to preach to his fellow inmates. 482 F.3d at 35, 38. The First Circuit recognized a substantial burden when, due to a generally-applicable prison regulation, he was not allowed to preach "anytime or anywhere." *Id.* Similarly, in deciding whether the relocation of a synagogue imposed a substantial burden, the Eleventh Circuit recognized the actual, particularized effect on observant Jews who may not drive on the Sabbath – they would have to walk farther to travel to the

synagogue. *Midrash Sephardi*, 366 F.3d at 1227-28. The circuit court found the burden "of walking a few extra blocks" to the synagogue insubstantial, *id.*, but it is unlikely that it would also have found the burden insubstantial if it meant an outright forfeiture of the right to congregate on the Sabbath.

In its application of *Adkins*, the court of appeals fundamentally misapplied RLUIPA by ignoring the ordinary or natural meaning of "burden" – "something that is oppressive." *See Midrash Sephardi*, 366 F.3d at 1226 ("Because RLUIPA does not define 'substantial burden,' we give the term its ordinary or natural meaning."); *San Jose Christian College*, 360 F.3d at 1034 (9th Cir. 2004) (quoting Black's Law Dictionary to define "burden"). The *Adkins* panel did not determine whether a regulation was oppressive to the adherent. Rather, the analysis in that case turned on whether the regulation prevented the adherent from participating in religious exercise that is not "generally allowed." This is in substantial conflict with the many cases recognizing a prison regulation as oppressive to religious exercise despite the fact that the exercise in question would not be "generally allowed." *See Shakur v. Selsky*, 391 F.3d 106, 120 (2d Cir. 2004);[5] *Charles v. Verhagen*, 220 F. Supp. 2d 937, 946 (W.D. Wis. 2002);[6] *Farrow v. Stanley*, No. 02-CV-567-B, 2004 U.S. Dist.

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[5] Plaintiff requested permission to attend the Eid ul Fitr feast, a Muslim holiday. *Id.* at 108.

[6] Plaintiff requested two communal meals: one to celebrate the end of Ramadan and one to celebrate the end of the Hajj. *Id.* Prison regulations limited religious feasts to one each year. *Id.*

LEXIS 1518, at *29-30 (D.N.H. Feb. 5, 2004);[7] *Marria v. Broaddus*, No. 97-CV-8297-NRB, 2003 U.S. Dist. LEXIS 13329, at *48 (S.D.N.Y. July 31, 2003);[8] *Agrawal v. Briley*, No. 02-CV-6807, 2004 U.S. Dist. LEXIS 16997, at *22 (N.D. Ill. Aug. 25, 2004).[9] *Baranowski* shows that *Adkins* was not a one-off situation; the circuit continues to ignore the fundamental nature of burdens by applying *Adkins* to RLUIPA challenges, and by failing to consider the challenged regulation's actual particularized effect on the adherent's religious exercise. This interpretation and application of the RLUIPA standard demands correction.

B. The Decision in the Court Below Conflicts With Supreme Court Doctrine.

In past cases, this Court has not shown special protection for government action that "indirectly" burdens religion. In *Sherbert v. Verner*, this Court held that an indirect burden may be constitutionally suspect. 374 U.S. 398, 404 (1963); *see also id.* (noting further that the "placing of conditions upon a benefit or privilege" can infringe religious liberty). In *Thomas*, the Court held that indirect compulsion may substantially impinge free exercise rights. 450 U.S. at 718-19; *accord*

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[7] Plaintiff requested access to a "sweat lodge," a place of healing used to cleanse the body and renew the spirit integral to Native religions. *Id.* at *5.

[8] Plaintiff requested access to the Supreme Mathematics and the Supreme Alphabet – both numerology devices associated with the Nation of Gods and Earths. *Id.* at *9.

[9] Plaintiff requested a nutritious diet free of meat and eggs as required by the Vaishnava Hindu religion. *Id.* at *2.

Warsoldier v. Woodford, 418 F.3d 989, 995 (9th Cir. 2005) (applying *Thomas* to an RLUIPA claim).

Despite this, the court of appeals justified its decision, at least in part, by reference to the "indirect" nature of the religious burden. *See Baranowski*, 486 F.3d at 125. ("We explained [in *Adkins*] that the plaintiff and other YEA members were not prevented from congregating by prison policy but by the dearth of clergy and authorized volunteers."); *Adkins*, 393 F.3d at 571; *cf. Civil Liberties for Urban Believers v. Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("[A] land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rending religious exercise . . . effectively impracticable."). Under this interpretation, indirect burdens are somehow less "substantial" than direct burdens.

The direct/indirect distinction is neither legitimate nor helpful. Indirect regulations can substantially burden religion. *See Agrawal*, 2004 U.S. Dist. LEXIS 16997, at *20-22 (finding that a regulation that conditioned a religious diet on written verification by a clergy member was a substantial burden under RLUIPA). Direct regulations may not substantially burden religion. *See Episcopal Student Found. v. Ann Arbor*, 341 F. Supp. 2d 691, 703-07 (E.D. Mich. 2004) (finding a denial of an application to demolish its existing church did not constitute a substantial burden). Because the Fifth Circuit relies on a distinction that this Court has already ruled inapposite in analogous religion cases, this petition should be granted, and that approach be corrected. *See Sherbert*, 374 U.S. at 404; *Thomas*, 450 U.S. at 718-19.

C. The Decision Ignores Distinctions Between Prisoner and Land-Use Cases.

The Fifth Circuit's approach also improperly imports principles relevant to land-use cases into its analysis of RLUIPA claims brought by prisoners such as Baranowski. In land-use cases, the adherent usually has an element of control. *See, e.g., Episcopal Student Found.*, 341 F. Supp. 2d at 704 (finding no "substantial burden" when "the solution to a majority of Plaintiff's myriad constraints appears to lie within Plaintiff's control"). If a church is denied a specific land use permit, for instance, the church may be able to find another suitable site. *See San Jose Christian College*, 360 F.3d at 1035. If alternative locations or opportunities for comparable religious exercise are available, the regulation may only inconvenience the adherent, and may not constitute a substantial burden. *See Midrash Sephardi*, 366 F.3d at 1227.[10]

In *Adkins*, the Fifth Circuit cited *Lyng v. N.W. Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988), one of this Court's land-use cases, to support its assertion that "merely preventing the adherent from either enjoying some benefit that is not generally available or acting in a way that is not generally allowed" is not a "substantial burden" upon an adherent. *Adkins*, 393 F.3d at 570. Prisoners, however, frequently rely wholly on prison management to provide opportunities for religious exercise. *See Cutter v. Wilkinson*,

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[10] In the same vein, if the burdened exercise is one of many means to the same end, the court may not find any single burden substantial. *See Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (finding that a restriction on selling t-shirts on the national mall was not a substantial burden on plaintiff's belief in the need to spread the gospel) (applying RFRA).

544 U.S. 709 (2005) ("RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion"). If the government constrains a prisoner's religious exercise, therefore, the prisoner often lacks the power – unlike those outside the prison walls – to seek alternative opportunities to participate in comparable forms of worship. In a prison setting, then, it is more likely that any restriction on religious practice will create a substantial burden on that practice. *See id.* at 720-21.

The Fifth Circuit panel did not take Baranowski's limited freedoms into account in deciding his appeal. Although the panel recognized that no rabbi or approved religious volunteer was available, the Court did not consider whether Baranowski had a reasonable opportunity to recruit sufficient free-world volunteers to satisfy the prison's group-worship regulation – especially considering the Sabbath travel restrictions for certain Jewish volunteers. *See Baranowski*, 486 F.3d at 124-25; *cf. Agrawal*, 2004 U.S. Dist. LEXIS 16997, at *21-23 (finding a prison's requirement that he receive documentation from a clergy member to receive a non-traditional diet a substantial burden because, among other reasons, defendants did not prove that a clergy member was available, willing, and able to confirm the adherent's religious requirements). The Court did not consider whether Baranowski could effectively recruit additional free-world volunteers for each Sabbath from behind prison walls, and thus could not determine whether the prison regulation effectively forces him to refrain from Sabbath group worship, resulting in a complete abandonment of that religious exercise.

Indeed, under the *Adkins* standard, courts need not determine whether or not an adherent was forced to refrain from religious exercise due to a lack of alternative opportunities for comparable forms of worship. Under that standard, burdens that force an adherent to refrain from important religious exercise could still be classified as insubstantial if the religious exercise is not "generally allowed." This defies common sense, along with multiple courts' interpretations. *See Mack v. O'Leary*, 80 F.3d 1175, 1180 (7th Cir. 1996) (interpreting RFRA); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (interpreting RFRA); *Charles*, 220 F. Supp. 2d at 946; *Farrow*, 2004 WL 224602, at *9; *Agrawal*, 2004 U.S. Dist. LEXIS 16997, at *21-23. In fact, some courts have recognized that, in a prison setting, restrictions that force adherents to refrain from group worship substantially burden religious exercise. *Marria*, 2003 U.S. Dist. LEXIS 13329, at *48-51; *Coronel v. Paul*, 316 F. Supp. 2d 868, 881-82 (D. Ariz. 2004), *reversed on other grounds by* 2007 U.S. App. LEXIS 6928 (9th Cir. Mar. 12, 2007). Because the Fifth Circuit standard does not consider the degree of control the prisoner has over alternative means of exercise, the Court should grant certiorari.

CONCLUSION

Prisoners have filed a significant number of claims under RLUIPA since its inception. *See* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y 501, 570 (2005) (recognizing sixty discrete prisoner cases that have ruled on either the merits of the claim or the constitutionality of RLUIPA). Prisoners will

continue to use RLUIPA to vindicate their statutory religious rights. Because the Fifth Circuit's application of RLUIPA differs from its sister circuits, a prisoner's right to religious exercise depends on where he is incarcerated – an anomalous result, considering that Congress sought to enact a single nationwide standard through Federal legislation. This Court should grant certiorari in this case to harmonize the application of the "substantial burden" standard. *Cf. id.* at 516 n.65 (collecting cases with inconsistent "substantial burden" standards).

Respectfully submitted,

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APPENDIX A

THOMAS H BARANOWSKI, Plaintiff-Appellant

v.

CHAPLAIN LARRY HART; LAWRENCE N HODGES, Huntsville Unit Warden; TED SANDERS, Rabbi TDCJ Chaplaincy Department; BILL PIERCE, TDCJ Chaplaincy Department; DOUGLAS DRETKE, TDCJ-ID, Director
Defendants-Appellees

No. 05-20646

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

486 F.3d 112; 2007 U.S. App. LEXIS 11633

May 4, 2007, Filed

COUNSEL: THOMAS H. BARANOWSKI, Plaintiff-Appellant, Pro se, Texas Department of Criminal Justice, Huntsville, TX.

LARRY HART, LAWRENCE N HODGES, Huntsville Unit Warden, TED SANDERS, BILL PIERCE, TDCJ Chaplaincy Department, DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONS INSTITUTIONS DIVISION, Defendants-Appellee: Marjolyn Carol Gardner, Assistant Attorney General, Office of the Attorney General, Law Enforcement Defense Div, Austin, TX.

JUDGES: Before HIGGINBOTHAM, WIENER, and PRADO, Circuit Judges.

OPINION BY: PRADO

OPINION

PRADO, Circuit Judge:

In this appeal, a Texas prisoner contends that the defendants-appellees violated his rights under the First Amendment, the Fourteenth Amendment, and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 *et seq.*, by failing to provide weekly Sabbath and other holy day services, by failing to allow Jewish prisoners to use the chapel for their religious services, and by failing to provide him with a kosher diet. He also alleges that he was improperly denied appointment of counsel, an evidentiary hearing, and his right to a jury trial. For the reasons that follow, we AFFIRM the district court's order granting summary judgment in favor of the defendants-appellees.

I. FACTUAL AND PROCEDURAL BACKGROUND

Thomas H. Baranowski ("Baranowski"), an inmate incarcerated in the Huntsville Unit of the Texas Department of Criminal Justice ("TDCJ"), proceeding pro se and *in forma pauperis,* filed a civil rights complaint in federal district court, pursuant to 42 U.S.C. § 1983, against employees and officials of the TDCJ: Defendants-Appellees Larry Hart ("Hart"), Huntsville Unit Chaplain; Lawrence Hodges, Huntsville Unit Warden; Ted Sanders, Rabbi for the TDCJ; Bill Pierce ("Pierce"), Director of the TDCJ Chaplaincy Department; and Douglas Dretke, former Director of the TDCJ (collectively, "Defendants").[1]

[1] Baranowski subsequently moved to dismiss Rabbi Ted Sanders as a defendant, and the motion was granted.

Baranowski's complaint sought declaratory and injunctive relief for alleged violations of the First Amendment, the Fourteenth Amendment, and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1 *et seq.*[2]

Baranowski, a member of the Jewish faith, alleged that Defendants "denied Jewish prisoners access to Sabbath services while depriving them of worship and fellowship and holyday [sic] services, meals and observances and finally discriminating against Jewish prisoners and favoring other faith groups in regard to chapel services, worship and rehabilitation." More specifically, Baranowski asserted that Defendants had deprived him and other Jewish inmates of access to Friday Sabbath services in September and October 2003 and High Holy Day services, had deprived him and other Jewish inmates of access to the Huntsville Unit chapel for their religious observances, and had failed to provide kosher diets conforming with the dietary laws of Judaism. Baranowski also claimed that prisoners of other religious faiths were treated more favorably than Jewish prisoners, citing limited religious services and chapel access for Jewish prisoners.[3]

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[2] Baranowski's complaint also alleged violations of the Fifth and Ninth Amendments, the Americans with Disability Act, the Rehabilitation Act, and the Texas Religious Freedom Act, as well as a § 1983 retaliation claim. Baranowski has not challenged the district court's ruling on these issues, and we decline to consider these claims any further on appeal. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (stating that pro se litigants must brief arguments to preserve them for appellate review).

[3] Although Baranowski listed other inmates as additional plaintiffs, the district court concluded that Baranowski was the only plaintiff in this lawsuit. Baranowski has not challenged this ruling on appeal.

Defendants moved for summary judgment, filing copies of various prison policies and sworn affidavits in support. In his affidavit, Pierce, the Director of the TDCJ Chaplaincy Department, testified that "TDCJ allows all offenders to worship according to their faith preference in their cell[s] using allowed items such as sacred texts, devotional items, and materials." According to Pierce, TDCJ policy is to allow inmates as much freedom and opportunity as possible for pursuing their individual beliefs and practices, consistent with agency security, safety, order, and rehabilitation concerns. Pierce explained that religious services are provided based on demand, need, and resources. He further testified that "[c]haplaincy services are nondiscriminatory in the treatment of offenders' religious beliefs, but TDCJ policy attempts to take space, time, and staffing restraints into consideration."

Pierce stated that of the 145,000 offenders currently confined in TDCJ, only 900 are self described as Jewish. Of those, only 70 to 75 are "recognized" as actually practicing their faith, with 90 in the conversion process. According to Pierce, these numbers are very small when compared to the number of observant Protestants, Catholics, and Muslims.

Pierce also stated that although Jewish programs and activities are not available at every unit, they are available at the Huntsville Unit, which is one of seven Jewish "host" units within the TDCJ. He explained that "[r]abbis, not offenders, lead Jewish services to ensure that religious practices reflect Jewish doctrines. There is no other way for TDCJ to accommodate the demand for Jewish congregational services from practicing Jews." According to Pierce, "[b]ecause of the small number of inmates who actually practice Judaism and attend Jewish services, as

well as the limited availability of rabbis in certain geographical areas of the state, TDCJ is unable to hold Jewish services at every Jewish host unit on a weekly basis." Pierce testified that services are held at least monthly at each of the Jewish host units. Pierce explained that in addition to monthly services, however, the TDCJ recognizes twenty-one Jewish holy days (compared with two for Christians), and that time off is permitted for eight of those days.

Pierce also testified about the numerous requests that TDCJ receives from inmates for special diets for religious reasons. He explained that:

> While TDCJ tries to accommodate inmates' religious needs, it must take into account the orderly administration of the prison and its resources while not giving any single inmate or group of inmates preferential treatment. If TDCJ were to grant one inmate's request for a special diet or religious item, numerous inmates would request similar special privileges.
>
> . . . .
>
> TDCJ has reviewed requests for kosher diets and has studied the impact of complying with such a request, by either providing a separate kosher kitchen or by bringing in kosher food from the outside. TDCJ has determined that it would be far too costly and would far exceed the allotted budget to provide kosher food. No TDCJ unit is currently set up to accommodate a kosher diet, which requires food preparation under certain ritual requirements and without contact with non-kosher food. Given the small number of offenders identifying themselves as Jewish (and the small number recognized as practicing Jews

> by TDCJ Jewish authorities), and their various classification and programmatic needs, at least several units would have to remodel their kitchens and substantially alter food preparation procedures. Kosher meals also are very costly. The state of Florida has reported that it costs them between 12 and 15 dollars per day per offender to provide kosher meals compared with $2.46 per day the State of Texas pays for offender meals. Providing kosher meals for a very small subset of offenders would place a tremendous burden on the ability of TDCJ to provide a nutritionally appropriate meal to all other offenders because of the budgetary impact alone. Furthermore, due to budget deficits, the Texas Legislature at the last legislative session specifically targeted inmate food services for a mandatory reduction in the biennial of more than $6 million. Providing kosher meals would put a great strain on an already strained system, and would raise resentment among other inmates because payments for kosher meals would of necessity come out of the general food budget for all inmates. The problem would be compounded because inmates of other faiths would seek similar privileges.

Pierce testified that as an alternative to kosher meals, "all inmates may choose to be served a pork-free diet or a vegetarian diet." In addition, Jewish inmates may receive kosher items from the Aleph Institute, a not-for-profit organization, at no cost to the state of Texas.

Prison policy 3.01, which Defendants included with their summary judgment motion, elaborates on TDCJ's diet policy and substantiates Pierce's testimony. It declares that the "[g]eneral population may select a regular tray, a meat-free tray, or a pork-free tray from the food service

line. Any type of meal may be selected from meal to meal." It goes on to state:

> [t]o assure minimal nutritional needs are met, menu item replacements using one of three options shall be made when meat or pork is not served:
>
> - Option 1 – 1 oz. of sliced cheese, additional 4 oz. of beans and additional serving of bread.
> - Option 2 – 1 hard-boiled egg and 1 peanut butter and jelly sandwich.
> - Option 3 – 1 peanut butter and jelly sandwich and additional 4 oz. serving of beans.

Finally, the policy adds that while chaplains may assist offenders in understanding what the food preferences or restrictions are for various religions, it is the offender's responsibility to follow dietary preferences or restrictions based on his designated faith preference.

Defendants also introduced affidavit testimony of Hart, a chaplain at the Huntsville Unit, in support of their summary judgment motion. Hart testified that because rabbis or approved outside volunteers lead Jewish services, "[s]cheduled events may be delayed or canceled when qualified spiritual leaders are not available." The Huntsville Unit has a contract rabbi who works with Hart to schedule Jewish services, order religious items, and authorize time off for Jewish holy days. Hart explained that Jewish services in September and October 2003 were canceled, as complained of by Baranowski, because a rabbi or qualified volunteer was not available.

Hart also testified about the use of the Huntsville Unit chapel. He explained that Friday night Sabbath services for the twelve Jewish inmates who routinely attend are held in the Education Department and not the chapel because the chapel is made available to the New Birth Bible Program, a group consisting of approximately 175 participants. Hart pointed out that the chapel is open to all offenders from 10:30 a.m. until 11:30 a.m. on Monday through Thursday for religious study.

The district court granted summary judgment and entered a judgment dismissing the complaint with prejudice. The district court held that the summary judgment evidence showed that restrictions on Baranowski's religious observances were justified by valid penological interests related to prison staffing, space limitations, and the financial burden of accommodating Baranowski's requests. The district court concluded that Baranowski had not shown that Defendants purposefully discriminated against him or that similarly situated individuals were treated differently. The district court also held that Baranowski had failed to present prima facie evidence that Defendants had "substantially burdened" his religious practices under RLUIPA. The district court concluded that even assuming Baranowski were to establish a substantial burden on his religious observance, "defendants' financial, safety, space, and security concerns for the prison, its inmates, and employees, and the goal of maintaining a neutral policy of religious accommodation for all recognized religious faiths, are compelling governmental interests."

Baranowski now appeals. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. *Freeman v. Tex. Dep't of Criminal Justice,* 369 F.3d 854, 859 (5th Cir. 2004). Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). If the movant satisfies its initial burden of demonstrating the absence of a material fact issue, then "'the non-movant must identify specific evidence in the summary judgment record demonstrating that there is a material fact issue concerning the essential elements of its case for which it will bear the burden of proof at trial.'" *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc) (quoting *Forsyth v. Barr,* 19 F.3d 1527, 1533 (5th Cir. 1994) (citations omitted)). "However, the nonmovant cannot satisfy this burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence." *Freeman,* 369 F.3d at 860.

III. DISCUSSION

Baranowski's appeal raises three challenges to the district court's summary judgment ruling: the dismissal of his free exercise claim; the dismissal of his equal protection claim; and the dismissal of his RLUIPA claim.[4]

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[4] Two additional issues raised by Baranowski can be disposed of here. First, Baranowski attempts to appeal the district court's denials of his motions for temporary restraining orders, but it is well established in this circuit that the denial of an application for a temporary restraining order is not appealable. *See House the Homeless, Inc. v.*

(Continued on following page)

Baranowski also contends that he was wrongly denied appointment of counsel, an evidentiary hearing, and the right to his day in court. We address each issue in turn.

A. Free Exercise Claim

Baranowski argues that Defendants have impeded his free exercise of religion under the First Amendment by denying him access to Jewish Sabbath and other holy day services, by depriving him of kosher meals required by his faith, and by denying him access to the Huntsville Unit chapel for religious observances. Defendants counter that valid penological objectives, including security, staff and space limitations, and financial burdens, justify TDCJ's policies, and that Baranowski has alternative means of practicing his religion.

This court reviews prison policies that impinge on fundamental constitutional rights under the deferential standard set forth in *Turner v. Safley,* 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Under *Turner,* a prison regulation that impinges on an inmate's constitutional rights is valid if it is reasonably related to legitimate penological interests. *Id.* at 89. *Turner* requires the court to consider four factors: (1) whether a valid and rational connection exists between the prison regulation and the legitimate governmental interest put forward to justify it;

Widnall, 94 F.3d 176, 180 n.8 (5th Cir. 1996). Second, Baranowski contends in his reply brief that he has raised a claim of "denial of due process rights to practice his Jewish faith." However, he has done nothing more than mention this as an issue, without any reference to it in the argument section of his initial or reply brief or any citation of legal authority. We decline to consider it further on appeal. *See Yohey,* 985 F.2d at 224-25.

(2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) the impact of the accommodation on prison guards, other inmates, and the allocation of prison resources generally; and (4) whether there are "ready alternatives" to the regulation in question. *Id.* at 89-90. "A court 'must determine whether the government objective underlying the regulation at issue is legitimate and neutral, and that the regulations are rationally related to that objective.'" *Freeman,* 369 F.3d at 860 (quoting *Thornburgh v. Abbott,* 490 U.S. 401, 414-15, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989)); *see also Scott v. Miss. Dep't of Corr.,* 961 F.2d 77, 80-81 (5th Cir. 1992) (explaining that a court need not "weigh evenly, or even consider, each of these factors," as rationality is the controlling standard).

Turning to the *Turner* factors, we hold that the TDCJ policies on the availability of religious services and use of the chapel pass constitutional muster. In so holding, we are guided by this circuit's recent decision in *Adkins v. Kaspar,* 393 F.3d 559 (5th Cir. 2004).

In *Adkins,* the plaintiff argued that his free exercise rights were denied when he and other members of the Yahweh Evangelical Assembly ("YEA") were not permitted to assemble on every Sabbath day and on particular holy days because no volunteer deemed acceptable by the defendants was available to supervise the meetings. 393 F.3d at 564. Applying the *Turner* factors, the court in *Adkins* first recognized that this court had recently held that the TDCJ's religious accommodationpolicy is rationally related to legitimate government objectives. *Id.* (citing *Freeman,* 369 F.3d at 861); *see also Freeman,* 369 F.3d at 861 (holding that TDCJ's religious accommodation policy "is neutral – it 'operate[s] . . . without regard to the

content of the expression'") (quoting *Turner,* 482 U.S. at 90). The court then looked to the second *Turner* factor, recognizing that "'[t]he pertinent question is not whether the inmates have been denied specific religious accommodations, but whether, more broadly, the prison affords the inmates opportunities to exercise their faith.'" *Adkins,* 393 F.3d at 564 (quoting *Freeman,* 369 F.3d at 861). The court concluded that YEA members had alternative means of exercising their religion, given their access to religious materials and their ability to hold and attend live services when a spiritual leader was available. *Id.* Applying the third *Turner* factor, the court reasoned:

> The 20 to 25 active members of YEA constitute less than one percent of the large inmate population at Coffield. Requiring the defendants to accommodate every religious holiday and requirement of the YEA, regardless of the availability of volunteers, space, or time, could "spawn a cottage industry of litigation and could have a negative impact on prison staff, inmates and prison resources." Moreover, if Adkins were accommodated and other similarly situated small religious groups were not, the YEA could appear to be favored over the others, a perception that could have a negative effect on prison morale and discipline.

Id. at 565 (quoting *Freeman,* 369 F.3d at 862). Finally, under the fourth *Turner* prong, the court determined that "no obvious, easy alternatives would accommodate both Adkins and the TDCJ's administrative needs." *Id.* (internal quotation marks and citation omitted). The court concluded that in light of the *Turner* factors, the dismissal of the plaintiff's free exercise claim was proper.

We reach the same result in the instant case pursuant to *Turner* on facts that are not materially different from *Adkins*. The record demonstrates that the prison policies at issue here are logically connected to legitimate penological concerns of security, staff and space limitations, and that there are no obvious or easy alternatives. Baranowski's main complaint is that the prison could accommodate the need for weekly Jewish services if inmates were permitted to lead the services without the assistance of a rabbi or approved outside volunteer. However, *Adkins* rejected this argument, and we do so again here. The summary judgment evidence shows that despite being denied weekly Sabbath services and other holy day services when a rabbi or approved volunteer is not present, Baranowski retains the ability to participate in alternative means of exercising his religious beliefs, including the ability to worship in his cell using religious materials and the ability to access the chapel and lockers containing religious materials on certain days and times.[5] *See O'Lone v. Estate of Shabazz,* 482 U.S. 342, 351-52, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987) (upholding a regulation that prevented Muslim prisoners from attending Friday Jumu'ah services, and recognizing that although there were "no alternative means of attending Jumu'ah [since] respondents' religious beliefs insist that it occur at a particular time," inmates were "not deprived of all forms of religious exercise, but instead freely observe a number of their religious obligations"); *see also Turner,* 482 U.S. at 90 ("Where other avenues remain available for the

[5] Although Baranowski contends that some inmates could not take advantage of the weekday religious study in the chapel because of work assignments, he does not claim that he was not able to do so himself.

exercise of asserted rights, courts should be particularly conscious of the measure of judicial deference owed to corrections officials in gauging the validity of the regulation.") (internal quotation marks, citations, and alterations omitted). Finally, the Jewish population at the TDCJ constitutes less than one percent of the total inmate population. If this court were to require the TDCJ to accommodate every religious holiday and requirement of the Jewish faith, regardless of the availability of qualified volunteers and adequate space and security, we "would spawn a cottage industry of litigation and could have a negative impact on prison staff, inmates, and prison resources." *Freeman,* 369 F.3d at 862. We decline to yield to Baranowski's demands.

We reach the same result on TDCJ's policy of not providing kosher meals. This circuit has already ruled that prisons need not respond to particularized religious dietary requests to comply with the First Amendment. *See Kahey v. Jones,* 836 F.2d 948 (5th Cir. 1988); *Udey v. Kastner,* 805 F.2d 1218 (5th Cir. 1986).

In *Kahey,* we held that the prison was not required to accommodate a Muslim inmate's request for a kosher diet, with particularized requirements regarding the content and preparation of food. 836 F.2d at 950-51. In applying the *Turner* factors, the court concluded that there was a logical connection between the prison policy on inmate diet and the "legitimate governmental interest in running a simplified prison food service rather than a full-scale restaurant." *Id.* at 950. The court also determined that the inmate's practice of Islam was "not entirely circumscribed in the prison, and that this factor, as the [Supreme Court] found in *O'Lone,* compensates for the prison's failure to satisfy her dietary demand." *Id.* at 951. The court concluded that the

impact of granting the inmate's request would be expensive, diverting resources from other penological goals, and could result in the perception that certain inmates were favored over others, which would have an adverse impact on prison morale. *Id.* Finally, the court found that there were simply no ready alternatives to satisfy the inmate's dietary requirements at a *de minimis* cost to the prison. *Id.*; *see also Turner,* 482 U.S. at 91.

Udey, decided before the Supreme Court's decision in *Turner,* also held that the First Amendment did not require a prison to provide an inmate with a diet consistent with his religious beliefs. 805 F.2d at 1221. The court reasoned that meeting the inmate's religious and dietary requirements would place undue costs and administrative burdens on the prison system because of the likelihood of proliferation of such requests and the concomitant need to meet multiple distinct dietary requests. *Id.*

For the reasons stated by the courts in *Kahey* and *Udey,* we conclude that denial of a kosher diet does not violate Baranowski's free exercise rights. Consequently, we affirm the district court's dismissal of Baranowski's First Amendment claim.

B. Equal Protection Claim

Baranowski next alleges that Defendants violated his equal protection rights by favoring other religions over Judaism. Specifically, he contends Christian and Muslim services are conducted more frequently than Jewish services, and that other groups have greater access to the chapel. Defendants respond that Baranowski has provided no summary judgment evidence of purposeful discrimination regarding any of his allegations.

To succeed on his equal protection claim, Baranowski "'must prove purposeful discrimination resulting in a discriminatory effect among persons similarly situated.'" *Adkins,* 393 F.3d at 566 (quoting *Muhammad v. Lynaugh,* 966 F.2d 901, 903 (5th Cir. 1992)). "However, the Fourteenth Amendment does not demand 'that every religious sect or group within a prison – however few in numbers – must have identical facilities or personnel.'" *Freeman,* 369 F.3d at 862-63 (quoting *Cruz v. Beto,* 405 U.S. 319, 322 n.2, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972)). Rather, prison officials must afford prisoners "reasonable opportunities . . . to exercise the religious freedom guaranteed by the First and Fourteenth Amendment[s]." *Cruz,* 405 U.S. at 322 n.2. "*Turner* applies with corresponding force to equal protection claims." *Freeman,* 369 F.3d at 863.

Baranowski's equal protection claim must fail. He has offered no competent summary judgment evidence that similarly situated faiths are afforded superior treatment, or that TDCJ's policies are the product of purposeful discrimination.[6] Although Baranowski claims that other religious groups have greater access to the chapel, it is recognized that "[a] special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand." *Cruz,* 405 U.S. at 322 n.2. It is therefore not constitutionally impermissible for Defendants to consider the demand and need of the group requesting the chapel, along with space and staffing

[6] To the extent Baranowski is raising an equal protection claim regarding the denial of kosher meals, the uncontroverted summary judgment evidence shows that the TDCJ does not serve kosher meals to any inmate.

limitations, when deciding where religious groups will conduct their services. *See id.* (noting that the Constitution does not demand that every religious group, regardless of size, have identical facilities).

In sum, Baranowski has failed to provide anything more than bald and unsubstantiated allegations that Defendants purposefully discriminated against him. This is not enough to succeed on an equal protection claim. *See Adkins,* 393 F.3d at 566. We therefore affirm the district court's dismissal of this claim.

C. RLUIPA Claim

Baranowski next argues that his inability to observe Sabbath and other holy day services and his inability to consume kosher meals substantially burden his ability to practice Judaism, in violation of RLUIPA. As a "Torah-observant Jew," Baranowski claims that he is compelled to observe the Sabbath and other holy days and to consume kosher food. He contends that the substantial burdens imposed by Defendants pressure him to modify his behavior and to violate his sincerely held religious beliefs. Defendants counter that Baranowski has failed to establish that his religious practices are substantially burdened. In the alternative, Defendants argue that their policies are the least restrictive means of furthering their compelling interests of security, safety, space, personnel, and financial concerns for the prison and its inmates and employees.

RLUIPA mandates that

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the

> burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). "RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson,* 544 U.S. 709, 721, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005).

The threshold inquiry under RLUIPA is whether the challenged governmental action substantially burdens the exercise of religion. The burden of proving the existence of a substantial interference with a religious exercise rests on the religious adherent. 42 U.S.C. § 2000cc-2(b). If such a substantial burden is proven, it is then up to the government to demonstrate that the compelling interest test is satisfied. *See id.*

RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A).[7] "'[T]he "exercise of religion" often involves not only belief and

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[7] "Although RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion . . . the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity." *Cutter,* 544 U.S. at 725 n.13. Here, however, Defendants have not argued that Baranowski is not sincere in his beliefs, and the record gives us no reason to question the sincerity of his religious beliefs.

profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine. . . .'" *Cutter,* 544 U.S. at 720 (quoting *Employment Div., Dep't of Human Res. of Ore. v. Smith,* 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). There is no question that the activities alleged to be burdened in this case – Jewish Sabbath and holy day services and keeping kosher – qualify as "religious exercises" for the practice of Judaism under RLUIPA's generous definition. *See Adkins,* 393 F.3d at 567-68 (stating that Sabbath and holy day gatherings "easily qualify as 'religious exercise' "); *Guzzi v. Thompson,* 470 F. Supp. 2d 17, 25 (D. Mass. 2007) (stating that the practice of "keeping kosher" constitutes a religious exercise for the Jewish faith).

In *Adkins,* we considered the meaning of "substantial burden," which is not defined by the statute. We held that "for purposes of applying the RLUIPA in this circuit, a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." 393 F.3d at 569-70. The court cautioned, however, that "our test requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a significant burden on an adherent's religious exercise. . . ." *Id.* at 571.

We first consider whether Baranowski's religious exercise was substantially burdened when he was prevented from congregating with other Jewish inmates on many Sabbath and Jewish holy days. The uncontroverted summary judgment evidence shows that on the days Baranowski claims that services were not provided, no

rabbi or approved religious volunteer was available to lead the services. This court considered a similar claim under RLUIPA in *Adkins;* the plaintiff in that case was prevented from gathering with other YEA members for various religious observances. We explained that the plaintiff and other YEA members were not prevented from congregating by prison policy but by the dearth of clergy and authorized volunteers. *Id.* We held that the requirement of an outside volunteer did not place a substantial burden on the plaintiff's religious exercise under RLUIPA. *Id.* In light of this court's decision in *Adkins* and the summary judgment evidence before us, we are convinced that the acts of Defendants regarding religious services have not placed a substantial burden on Baranowski's free exercise of his Jewish faith, within the contemplation of RLUIPA. *See id.*

We next consider whether the failure of Defendants to provide Baranowski with a kosher diet constitutes a substantial burden on his religious exercise. Baranowski argues that his inability to consume kosher food has pressured him to modify his behavior and to violate his sincerely held religious beliefs. *Cf. Ran-Dav's County Kosher, Inc. v. New Jersey,* 129 N.J. 141, 608 A.2d 1353, 1355-56 (N.J. 1992) (describing Jewish dietary laws and their significance to Judaism). Given the strong significance of keeping kosher in the Jewish faith, the TDCJ's policy of not providing kosher food may be deemed to work a substantial burden upon Baranowski's practice of his faith.

Turning to the compelling interest test, Defendants must show that their dietary policy of not providing kosher meals is the least restrictive means of furthering a compelling governmental interest. As the Supreme Court recently explained, "'[c]ontext matters' in the application of that

standard." *Cutter,* 544 U.S. at 723 (quoting *Grutter v. Bollinger,* 539 U.S. 306, 327, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003)). Courts should apply the "compelling governmental interest" standard with "'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" *Id.* (quoting S. REP. NO. 103-111, at 10 (1993)) RLUIPA, in other words, is not meant to elevate accommodation of religious observances over the institutional need to maintain good order, security, and discipline or to control costs. *See Lovelace v. Lee,* 472 F.3d 174, 190 (4th Cir. 2006).

The uncontroverted summary judgment evidence submitted by Defendants establishes that TDCJ's budget is not adequate to cover the increased expense of either providing a separate kosher kitchen or bringing in kosher food from the outside; that TDCJ's ability to provide a nutritionally appropriate meal to other offenders would be jeopardized (since the payments for kosher meals would come out of the general food budget for all inmates); that such a policy would breed resentment among other inmates; and that there would be an increased demand by other religious groups for similar diets.

Based on the record before us, we hold that this policy is related to maintaining good order and controlling costs and, as such, involves compelling governmental interests. *Cf. Andreola v. Wisconsin,* 211 Fed. Appx. 495 at 499, 2006 WL 3724633, at *3 (7th Cir. 2006) (unpublished) (finding no RLUIPA violation where the defendant did not provide kosher meals based on the compelling governmental interests of maintaining security and "abating the costs of a prisoner's keep"). Further, the administrative and

budgetary interests at stake cannot be achieved by any different or lesser means. *Cf. Cutter,* 544 U.S. at 726 ("Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition."). Accordingly, we conclude that the district court properly granted summary judgment on Baranowski's RLUIPA claim.

D. Other Claims

Lastly, Baranowski claims that the district court erred in denying his request for appointment of counsel and by not giving him an evidentiary hearing or his day in court. These claims are without merit.

Under 28 U.S.C. § 1915(e)(1), the court may appoint an attorney to represent a litigant in federal court, but there is no automatic right to appointment of counsel in a civil rights case. *See Castro Romero v. Becken,* 256 F.3d 349, 353-54 (5th Cir. 2001). "In evaluating whether the appointment of counsel is proper, the district court considers the type and complexity of the case, the litigant's ability to investigate and present the case, and the level of skill required to present the evidence." *Id.* at 354. We review the district court's denial of appointment of counsel for an abuse of discretion. *Id.*

The district court held that Baranowski did not have a right to court-appointed counsel because of his "demonstrated ability to litigate his case" and "the elementary nature of [the] issues" involved in the case. After reviewing the record, we conclude that the district court did not abuse its discretion.

We also conclude that Baranowski has failed to show how his claims would have been advanced by an evidentiary hearing. He argues that he has not been given a chance to present "real evidence to support his wholesome claims." Baranowski has not shown why a hearing is needed to bring forth such evidence or why he did not present this evidence in his opposition to Defendants' motion for summary judgment. Accordingly, we cannot hold that the district erred in not conducting an evidentiary hearing.

Finally, Baranowski's claim that he was denied a jury trial is frivolous. Federal Rule of Civil Procedure 56(c) requires the court to render summary judgment if the appropriate materials on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As this court has explained, "[t]he function of the jury is to try the material facts; where no such facts are in dispute, there is no occasion for jury trial. Thus the right to trial by jury does not prevent a court from granting summary judgment." *Plaisance v. Phelps,* 845 F.2d 107, 108 (5th Cir. 1988). When the district court properly entered summary judgment dismissing Baranowski's claims, his demand for a jury trial became moot. *See id.*

IV. CONCLUSION

For the reasons stated above, we affirm the district court's grant of summary judgment.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THOMAS A. BARANOWSKI, TDCJ-CID # 378384	§	
Plaintiff,	§	CIVIL ACTION
v.	§	NO. H-03-3893
LARRY HART, *et al.*,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Thomas A. Baranowski,[1] an inmate incarcerated in the Texas Department of Criminal Justice – Correctional Institutions Division (TDCJ) Huntsville Unit, proceeding *in forma pauperis* and *pro se,* filed a civil rights complaint under 42 U.S.C. § 1983 and 42 U.S.C. § 2000cc-1, *et seq.* (RLUIPA) against TDCJ Chaplain Larry Hart, Warden Lawrence Neill Hodges, Bill Pierce, Ted Sanders, and Douglas Dretke.

Pending before the Court are plaintiff's motions to dismiss Ted Sanders (Docket Entry No. 15), for an evidentiary hearing, and for appointment of counsel (Docket Entries No. 28 and 29). Respondents have filed a motion for summary judgment (Docket Entry No. 17), to which plaintiff has responded (Docket Entry No. 18). For the

[1] Baranowski named other inmates as additional plaintiffs in his lawsuit. (Docket Entry No. 6, Part D.) These individuals have not signed any pleadings, sought joinder, or intervened as plaintiffs, and no class action status has been granted by the Court. Accordingly, Baranowski is the only plaintiff in this lawsuit.

reasons set forth below, summary judgment will be **GRANTED** and this case dismissed.

I. Background and Claims

According to his form complaint (attached to Docket Entry No. 4) and first amended complaint (Docket Entry No. 6), plaintiff is an inmate practicing the Jewish faith. He claims that the defendants violated the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (RLUIPA), and his First and Fourteenth Amendment rights of religious freedom, equal protection, and due process, by (1) not providing Friday evening services during September and October, 2003; (2) not providing Saturday morning services (followed by showers); (3) not providing services for the 2003 Jewish High Holy Days; (4) not providing a "break-the-fast" meal following the 2003 Yom Kippur day of fasting; (4) limiting access to religious tapes and books located in the prison chapel; (5) not providing kosher-prepared meals; and (6) holding Friday evening services in a classroom instead of the chapel.

Plaintiff seeks a declaratory judgment, a permanent injunction, changes in TDCJ policies regarding Jewish inmates (Docket Entry No. 4, Complaint), and unspecified damages (Docket Entry No. 6, Part F).

In their motion for summary judgment, defendants argue, *inter alia,* that plaintiff's claims are without merit and should be dismissed.

The Court first will address plaintiff's pending non-dispositive motions.

II. Plaintiff's Non-Dispositive Motions

A. Motion to Dismiss Ted Sanders

Plaintiff requests that Ted Sanders be dismissed as a defendant (Docket Entry No. 15). The motion is **GRANTED**, and Ted Sanders is dismissed from this lawsuit.

B. Motion for Leave and Motion for an Evidentiary Hearing

Plaintiff has filed a motion seeking leave to file a motion for an evidentiary hearing, and a motion for an evidentiary hearing. (Docket Entries No. 28, 29). Because the Court will grant summary judgment dismissing this lawsuit, the motions are **DENIED AS MOOT**.

C. Motion for Leave and Motion for Appointment of Counsel

Plaintiff has filed a motion seeking leave to file a (second) motion for appointment of counsel, and a (second) motion for appointment of counsel. (Docket Entries No. 28, 29). Because the Court will grant summary judgment dismissing this lawsuit, the motions are **DENIED AS MOOT**. Moreover, and as the Court stated in its order denying plaintiff's first request for counsel, there is no right to court-appointed counsel in a civil rights case, and appointment of counsel is not warranted in this lawsuit due to the elementary nature of its issues and plaintiff's demonstrated ability to litigate his case.

III. Summary Judgment Standards

In deciding a motion for summary judgment, the court must determine whether the pleadings, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Once the movant presents a properly supported motion for summary judgment, the burden shifts to the nonmovant to show with significant probative evidence the existence of a genuine issue of material fact. *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000). All evidence must be construed in the light most favorable to the nonmoving party without weighing the evidence, assessing its probative value, or resolving any factual disputes. *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir. 1996). However, the nonmovant cannot rely on conclusory allegations or unsubstantiated assertions to establish that there is a triable issue. *Wallace v. Texas Tech University*, 80 F.3d 1042, 1047 (5th Cir. 1996).

IV. First Amendment Claims

Plaintiff complains that defendants violated his right to religious freedom by (1) not providing Friday evening services during September and October, 2003; (2) not providing Saturday morning services (followed by showers); (3) not providing services for the 2003 Jewish High Holy Days; (4) not providing a "break-the-fast" meal following the 2003 Yom Kippur day of fasting; (4) limiting access to religious tapes and books located in the prison chapel; (5) not providing kosher-prepared meals; and (6) holding Friday evening services in a classroom instead of the chapel.

The Constitution requires that an inmate be given a reasonable opportunity to exercise the religious freedoms guaranteed by the First and Fourteenth Amendments. *Cruz v. Beto,* 405 U.S. 319, 322 (1972). An inmate retains his First Amendment right to the free exercise of his religion, subject to reasonable restrictions and limitations necessitated by penological goals. *Turner v. Safley,* 482 U.S. 78, 89-91 (1987); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349-50 (1987). Prison officials have a duty to accommodate an inmate's religious beliefs unless there is a legitimate penological interest which prevents such accommodation. *Eason v. Thaler,* 14 F.3d 8, 10 (5th Cir. 1994). If a prison regulation impinges on an inmate's first amendment rights, the regulation is valid only if it is reasonably related to a legitimate penological interest. *Turner,* 482 U.S. at 87. If the court is reviewing action taken by prison officials rather than a regulation, the same standard is applicable to determine whether the prison official's act is constitutionally permissible. *Jackson v. Cain,* 864 F.2d 1235, 1248 (5th Cir. 1989).

In determining whether a regulation or policy is a valid restriction reasonably related to a legitimate penological interest, the Court considers the following factors:

(1) whether there exists a valid, rational connection between a restriction and the governmental interest invoked to justify it;

(2) the availability of an alternative means to exercise the restricted right;

(3) the impact on guards, other inmates, and the allocation of prison resources that would result from accommodating the asserted right; and

(4) whether there are ready alternatives to the restriction.

Turner, 482 U.S. at 89-91; *Adkins v. Kaspar,* 393 F.3d 559, 564 (5th Cir. 2004). In support of summary judgment, defendants present the following affidavit testimony of Billy Pierce, Director of the TDCJ Chaplaincy Department:

> The Chaplaincy Department receives numerous requests from inmates for special consideration in terms of religious items, diets, services, and privileges. While TDCJ tries to accommodate inmates' religious needs, it must take into account the orderly administration of prison and its resources while not giving any single inmate or group of inmates preferential treatment. If TDCJ were to grant one inmate's request for a special diet or religious item, numerous inmates would request similar special privileges.
>
> There are approximately 145,000 offenders currently confined in TDCJ, and only about 900 classify themselves as Jewish. Not all of self-identified Jewish offenders actively practice their faith. There are approximately 70 to 75 offenders in TDCJ who are recognized as Jewish and approximately 90 more who are in the conversion process. These numbers are very small compared to the total number of offenders and to the numbers of Protestants, Catholics, and Muslims. . . . Limited resources and the low Jewish population preclude Jewish activities, classes, and programs at every unit. Instead, TDCJ has limited Jewish programs and classes to seven units designated as Jewish host units [including the Huntsville unit].
>
> * * *

The main obstacle to giving Jewish inmates all the Jewish activities and privileges that they desire are our scarce resources, limited availability of rabbis, and the very low demand.

* * *

Many inmates have requested special diets for religious reasons. TDCJ has reviewed requests for kosher diets and has studied the impact of complying with such a request, by either providing a separate kosher kitchen or by bringing in kosher food from the outside. TDCJ [h]as determined that it would be far too costly and would far exceed the allotted budget to provide kosher food. . . . The problem would be compounded because inmates of other faiths would seek similar privileges.

As an alternative to kosher meals, all inmates may choose to be served a pork-free diet or a vegetarian diet. TDCJ can afford to provide these diets and they are available to all inmates. I do not know of any other way to accommodate the demand for kosher foods given TDCJ's limited resources and the need to treat all offenders equally. In addition, Jewish inmates may receive Kosher items from the Aleph Institute in Florida.

Because of the small number of inmates who actually practice Judaism and attend Jewish services, as well as the limited availability of rabbis in certain geographical areas of the state, TDCJ is unable to hold Jewish services at every Jewish host unit on a weekly basis. Services are held at least monthly at each of the Jewish host units. Rabbis, not offenders, lead the Jewish services to ensure that religious practices reflect Jewish doctrines. There is no other way for TDCJ to

> accommodate the demand for Jewish congregational services from practicing Jews.
>
> TDCJ recognizes 21 Jewish holy days and permits offenders to take time off for eight of those days. TDCJ recognizes only two holy days for Christians.

(Docket Entry No. 17, Affidavit of Billy Pierce, pp. 2-4.) Plaintiff does not challenge this testimony with probative summary judgment evidence.

In further support of summary judgment, defendants present the following affidavit testimony of Larry Hart, a chaplain at the Huntsville unit employed by TDCJ since 1999:

> As a unit chaplain, I am not expected to function in the role of a faith-group official. I facilitate the ministry of representatives of various faith groups by managing the schedule of volunteer and contract chaplain services, ceremonies, and study groups.
>
> * * *
>
> TDCJ employs a lead contract rabbi to serve as the advisor to unit contract rabbis with decision-making authority with respect to the interpretation of Jewish law and customs. My unit's contract rabbi works with me to schedule Jewish services, order religious items, and authorize lay-ins (time off) for Jewish holy days.
>
> * * *
>
> Chaplains are responsible for scheduling regular opportunities for worship and other religious activities for offenders. All such meetings must, however, be governed by unit rules, regulations, and policies with regard to staff and volunteer

safety, security and orderly conditions of the unit, and offender conduct. Scheduled events may be delayed or canceled due to safety and security concerns.

Chaplains have no control over showers. This is strictly a security matter.

Ordinarily, worship events, religious activities and meetings of a religious nature are under the direct supervision of the unit's chaplain. The chaplain and warden may draw upon approved religious volunteers from the outside community to help facilitate and conduct scheduled religious activities. Rabbis or approved outside volunteers, not offenders, lead the Jewish services to ensure that religious practices reflect Jewish doctrines. Scheduled events may be delayed or canceled when qualified spiritual leaders are not available. *Jewish services were cancelled on September 5, 2003, September 12, 2003, October 3, 2004, and October 10, 2003 because a Rabbi or qualified volunteer was not available.*

Chaplaincy services are nondiscriminatory in the treatment of offenders' religious beliefs, but TDCJ policy attempts to take space, time, and staffing restraints into consideration. All services, religious and otherwise, are provided based on demand, need, and resources. For example, *the New Birth Bible Program with approximately 175 participants has met in the Huntsville Unit's chapel every Friday evening for the past 12 years. Only 12 individuals routinely attend Jewish services. As a result, Friday evening Jewish services are conducted in the Education Department.*

Although Jewish offenders are denied access to the chapel on Friday evenings, the chapel is open

> to all offenders from 10:30 a.m. until 11:30 a.m. every Monday, Tuesday, Wednesday, and Thursday for religious study. During these times offenders have access to lockers containing religious materials. Unfortunately, the chapel does not have any devices for replaying audio recordings.
>
> TDCJ recognizes 21 Jewish holy days and permits offenders to take time off (have lay-ins) for eight of those days. Purim is not designated as a holiday with time off (lay-in). I do not recall what happened with regard to Yom Kippur in 2003.

(Docket Entry No. 17, Affidavit of Larry Hart, pp. 2-3, emphasis added.) Plaintiff does not challenge this testimony with probative summary judgment evidence.

The Fifth Circuit has upheld the constitutionality of TDCJ's religious accommodation policy as rationally related to legitimate governmental interests. *Freeman v. Texas Department of Criminal Justice,* 369 F.3d 854 (5th Cir. 2004). The Fifth Circuit specifically held that prison staff and space limitations, as well as financial burdens, are valid penological interests. *Id.* at 861.

Based on the summary judgment record before it, the Court finds that TDCJ's accommodation policies and practices as set forth in these affidavits satisfy the *Turner* factors as to plaintiff's complaints. The pertinent question is not whether plaintiff has been denied specific religious accommodations, but whether, more broadly, the prison affords him opportunities to exercise his faith. *Freedman,* 369 F.3d at 861. Plaintiff does not assert that defendants denied or restricted his right to practice Judaism in his cell, or that he had no other alternative means of practicing his religious faith. Nor has he pointed to some obvious

regulatory alternative that fully accommodates his asserted rights while not imposing more than a *de minimis* cost to TDCJ's valid penological goal of maintaining prison security and discipline and remaining within its financial, personnel, and space restraints, and nondiscriminatory policy.

Plaintiff shows no violation of his free exercise rights, and defendants are entitled to summary judgment.

V. Fourteenth Amendment Claims

Plaintiff claims that defendants violated his due process and equal protection rights by (1) not providing Friday evening services during September and October, 2003; (2) not providing Saturday morning services (followed by showers); (3) not providing services for the 2003 Jewish High Holy Days; (4) not providing a "break-the-fast" meal following the 2003 Yom Kippur day of fasting; (4) limiting access to religious tapes and books located in the prison chapel; (5) not providing kosher-prepared meals; and (6) holding Friday evening services in a classroom instead of the chapel.

To maintain his claims for violation of due process and equal protection under the Fourteenth Amendment, plaintiff must allege and prove purposeful discrimination by defendants resulting in a discriminatory effect among persons similarly situated. *See Muhammad v. Lynaugh,* 966 F.2d 901, 903 (5th Cir. 1992). The Fourteenth Amendment does not demand that every religious sect or group within a prison, however few in numbers, must have identical prison facilities or personnel. *Freedman,* 369 F.3d at 862. Rather, prison administrators must provide inmates with

reasonable opportunities to exercise their religious freedoms. *Id.* at 863.

The fact that TDCJ's religious accommodation and related policies and regulations adversely impact plaintiff and his religious practices does not, by itself, establish a Fourteenth Amendment violation. "[D]isparate impact, alone, cannot suffice to state an Equal Protection violation; otherwise, *any* law could be challenged on Equal Protection grounds by whomever it has negatively impacted." *Rodriguez v. Johnson,* 110 F.3d 299, 306 (5th Cir. 1997) (emphasis in original). To maintain an equal protection claim, plaintiff must allege and prove that he received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent. *Taylor v. Johnson,* 257 F.3d 470, 472 (5th Cir. 2001).

Plaintiff complains that defendants did not provide him with kosher meals. He does not claim that defendants provided some inmates or religious groups with kosher meals while he himself was not. That "free world" religious support groups, with TDCJ approval, may have donated religious food to inmates of other religious groups does not establish an equal protection claim, and plaintiff does not allege that defendants turned away "free world" supporters who offered to provide him with kosher food. To state a claim under the Equal Protection Clause, a plaintiff must allege that similarly situated individuals have been treated differently. *Yates v. Stalder,* 217 F.3d 332, 334 (5th Cir. 2000). The inquiry focuses on whether the plaintiff is similarly situated to another group for purposes of the challenged governmental action. *Yates,* 217 F.3d at 334. The summary judgment evidence clearly shows that TDCJ does not provide kosher food to *any* inmate.

Discriminatory purpose in an equal protection context implies that the decision maker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group. *Johnson v. Rodriguez,* 110 F.3d 299, 306 (5th Cir. 1997). Plaintiff does not present any summary judgment evidence that TDCJ's refusal to serve kosher meals is intended to discriminate against inmates of one religious faith or another. Defendants' unchallenged evidence, on the other hand, demonstrates that TDCJ's refusal to serve kosher meals is based on financial and uniformity considerations.

This same reasoning holds against plaintiff's claims of failure to provide Friday services in September – October of 2003, failure to provide Saturday morning services with showers, limited access to TDCJ's collection of religious tapes and books, lack of a Yom Kippur "break-the-fast" meal on October 6, 2003, and the holding of Friday evening services in a classroom instead of the chapel. Plaintiff provides no summary judgment evidence of "purposeful discrimination resulting in a discriminatory effect among persons similarly situated." *Adkins,* 393 F.3d at 566. To the contrary, defendants' uncontroverted summary judgment evidence shown above sets forth neutral, non-discriminatory reasons for these events or situations. It is immaterial that defendants cannot recall what happened with regard to Yom Kippur in 2003, as plaintiff fails to present summary judgment evidence in support of his claim. His allegations of religious discrimination are conclusory and insufficient to defeat defendants' motion for summary judgment. Even assuming defendants did not provide plaintiff with a break-the-fast meal on October 6,

2003, this Court finds that such complaint fails to rise to the level of a constitutional issue.

Plaintiff's claims under the Fourteenth Amendment are without merit and will be dismissed.

VI. RLUIPA

The RLUIPA, codified at 42 U.S.C. § 2000cc, provides in pertinent part as follows:

> § 2000cc-1. Protection of religious exercise of institutionalized persons
>
> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

RLUIPA prohibits the State from imposing a "substantial burden" on the practice of religious faith. Under the RLUIPA, plaintiffs must produce *prima facie* evidence to support a violation, and they bear the burden of persuasion on whether the policies and regulations substantially burden their exercise of religion. 42 U.S.C. § 2000cc-2(b). A "religious exercise" for purposes of the RLUIPA includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C.

§ 2000cc-5(7)(A). The Supreme Court recently made it clear that under RLUIPA, accommodation of religious observances is not elevated over a prison's need to maintain order and safety. *Cutter v. Wilkinson,* ___ U.S. ___, 125 S. Ct. 2113, 2122 (2005).

The Fifth Circuit has determined that governmental action or regulation creates a "substantial burden" on a religious exercise if it "truly pressures the adherent to significantly modify his religious behavior and significantly violates his religious beliefs." *Adkins,* 393 F.3d at 570. A governmental action or regulation does not rise to the level of a substantial burden on religious freedom if it "merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed." *Id.*

In this case, plaintiff fails to present *prima facie* evidence that defendants have "substantially burdened" the practice of his religion. The uncontroverted summary judgment evidence shows that on the days plaintiff claims no Friday evening services were provided, no rabbi or approved religious volunteer was available to lead the services. Plaintiff does not submit any summary judgment evidence that defendants turned away an available rabbi or approved religious volunteer for those services. The uncontroverted evidence further shows that for the past twelve years, the chapel has been used on Friday evenings by a religious group of 175 members. That plaintiff's religious group of 12 or so members must use classroom facilities for Friday evening services does not create a substantial burden on plaintiff's religious practices, nor does the fact that Saturday morning Jewish services (with showers) are not provided in addition to Friday evening services. Plaintiff presents no probative summary judgment

evidence that defendants denied him services for the 2003 Jewish High Holy Days or a "break-the-fast" meal following the 2003 Yom Kippur day of fasting. Even assuming such events occurred, they were not "subtsantial burdens" on plaintiff's religious freedom. Moreover, it is clear from the unchallenged evidence that defendants provide access to religious books and materials located in the prison chapel, and that financial and space limitations, as well as considerations for fairness to all inmates, and religious groups, prevent defendants from providing plaintiff kosher meals and the other religion-based demands he seeks.

Even assuming plaintiff were to establish these instances as substantial burdens on the practice of his religion, defendants' financial, safety, space, and security concerns for the prison, its inmates, and employees, and the goal of maintaining a neutral policy of religious accommodation for all recognized religious faiths, are compelling governmental interests. Defendants have shown, and plaintiff has not shown to the contrary, that defendants' regulations and policies are the least restrictive means of furthering those compelling governmental interests. *See Adkins,* 393 F.3d at 567-68. As the Supreme Court noted in *Cutter,* "Should inmate requests for religious accommodations become excessive, impose unjustified burden on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition." 125 S. Ct. at 2125.

No RLUIPA violations have been shown, and defendants are entitled to summary judgment dismissing plaintiff's claims under that statute.

VII. Retaliation

To sustain a section 1983 retaliation claim, a plaintiff must establish (1) the existence of a specific constitutional right; (2) the defendants' intent to retaliate for the exercise of that right; (3) a retaliatory adverse act; and (4) causation. *Freedman,* 369 F.3d at 863. Plaintiff presents only unsupported conclusory allegations that defendants retaliated against him, and the claim is dismissed. *See Woods v. Smith,* 60 F.3d 1161, 1166 (5th Cir. 1995).

VIII. State Law and ADA claims

To the extent plaintiff claims that his rights under the Americans with Disabilities Act (ADA) and "Rehabilitation Act" have been violated, such claims are without support. Plaintiff neither alleges nor establishes that he has a disability as that term is meant under the ADA, and he fails to show that either the ADA or the "Rehabilitation Act" are applicable to the claims brought in this lawsuit.

The exact nature of his state law claims is unclear from plaintiff's pleadings. Regardless, as the Court has dismissed plaintiff's federal law claims, it declines to exercise supplemental jurisdiction over any state law claims he may have raised. 28 U.S.C. § 1367(c)(3).

IX. Conclusion and Order

The Court **ORDERS** as follows:

(1) Plaintiff's motion to dismiss Ted Sanders (Docket Entry No. 15) is **GRANTED**.

(2) Plaintiff's motions for an evidentiary hearing and appointment of counsel (Docket Entries No. 28, 29) are **DENIED**.

(3) Defendants' Motion for Summary Judgment (Docket Entry No. 17) is **GRANTED** and plaintiff's federal claims are **DISMISSED** with prejudice.

(4) Plaintiff's state law claims are **DISMISSED** without prejudice.

(5) All other pending motions and requests for relief are **DENIED**.

SIGNED on July 15, 2005

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES
DISTRICT JUDGE

FILED
OCT 31 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-137

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS H. BARANOWSKI
Petitioner,

v.

LARRY HART, et al.,
Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Baranowski continues to have standing when during this litigation he has voluntarily changed his designated religious preference away from Judaism to now be "none."

2. Whether the court of appeals was correct to affirm a summary judgment granted against Baranowski on his claim under the Religious Land Use and Institutionalized Persons Act for failure to show a "substantial burden."

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In this petition for certiorari review, Baranowksi argues that the Fifth Circuit's application of the RLUIPA "substantial burden" standard is inconsistent with the approach of other circuits and conflicts with Supreme Court doctrine. However, Baranowksi failed to preserve any issue for review and this Court now lacks jurisdiction to consider those claims. Alternatively, his claims are wholly without merit, and this writ of certiorari should be denied.

STATEMENT OF THE CASE

The petition omits the facts relevant to the Court's consideration of whether Baranowski has standing to assert a Religious Land Use and Institutionalized Persons Act (RLUIPA) claim in regard to these religious services.

In 1998, on a form provided by the prison system to facilitate the accommodation of prisoners' beliefs, Baranowski changed his designated religious preference from "none" to "Judaism-Hebrew." (App. A at 3).

In 2003, Baranowski filed the claim at issue in this petition, contending that the RLUIPA was violated when he was unable to attend Friday night services on four specified dates on which a rabbi was unavailable to participate. (Pet. App. B at 32).

The district court eventually granted summary judgment to the defendants on all claims. On the single claim relevant to this petition for certiorari, the court held that Baranowski failed to survive summary judgment on his claim that his rights were substantially burdened within the meaning of RLUIPA when he was unable to attend religious services on four occasions when a volunteer religious officiant chose not to come to his unit. (Pet. App. B at 32). Baranowski appealed.

During the pendency of his appeal, Baranowski elected to change his designated religious preference to "none." (Pet. App. B). To the best of defendants' knowledge, that is Baranowski's most recent designation.

After the Fifth Circuit affirmed that judgment on May 4, 2007, two interest groups (the Aleph Institute and Jewish Prisoner Services International) moved to intervene and moved for panel rehearing. Those groups noted that Baranowski had changed his official religious affiliation from "Jewish" to "none," arguing that this deprived him of standing to pursue his claims. (App. B). The state officials filed a response representing that they had previously been unaware that Baranowksi had changed his designated religious preference.[1] The Fifth Circuit denied the proposed intervenors' motions on

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1 The state defendants responded to this motion by arguing that this case could be saved from the mootness doctrine by the 'capable of reptition yet evading review' exception. Standing, however, present a different set of prudential concerns. And this Court – if it grants review and hears argument – may well reach the conclusion that the case must be dismissed for want of standing.

June 8, 2007.

REASONS FOR DENYING THE PETITION

I. There Are Serious Questions Whether Baranowski Now Has Standing To Pursue This Prospective Relief Given His Changing Religious Designation.

This case makes a remarkably poor vehicle to address the meaning of this statute because there are serious questions about Baranowski's standing, as he no longer claims to be Jewish. Baranowski has changed his faith from "Jewish" to "none." (App. B at 23, 29). This Court should not grant review.

To have Article III standing, Baranowski must allege that his "particular freedoms are infringed" *Sch. Distr. Of Abington v. Schempp,* 374. U.S. 203, 224 n.9 (1963). Because Baranowski sought prospective relief as a Jewish inmate, a position he has voluntarily relinquished, he is not suffering an "actual or imminent" injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Baranowski lacks standing to maintain this action. *Craig v. Boren,* 429 U.S. 190, 192 (1976).

At worst, Baranowski lacks standing because he no longer is the proper plaintiff to be pursuing prospective relief about the availability of religious services for Jewish inmates. At best, Baranowski's claim would involve complex questions regarding whether there exists an alleged circuit split. Those are questions not briefed or addressed by the courts below, and that are better dealt

with in a case involving a plaintiff who presents them straightforwardly.

II. There Is No Meaningful Split Warranting This Court's Intervention.

In framing a circuit split, the petition:

1) overstates the absoluteness of the Fifth Circuit's rule, creating the false impression that the circuit's controlling precedent does not permit analysis of a plaintiff's particular circumstances — which it does;

2) treats other circuits' *land-use cases* as being equivalent to their prisoner cases — which subsequent cases from some of those circuits have made clear is not the complete picture; and

3) ignores the reality that the various circuits' view of this area is *converging* in the wake of recent decisions, suggesting that percolation of these fine-grained issues in the lower courts may yet resolve any remaining disagreements.

A. Contrary to the Petition's Characterization, the Fifth Circuit's Rule Expressly Permits Consideration of the Plaintiff's Individual Circumstances.

The petition seems aimed more at the Fifth Circuit's prior decision in *Adkins v. Kaspar,* 393 F.3d 559 (5th Cir. 2004), *cert. denied,* 545 U.S. 1104 (2005), than at the decision below. Indeed, it is the Fifth Circuit's formulation

of the rule in Adkins that is attacked rather than the application of that rule to the facts of this case.

The petition asserts that Adkins "refused to engage in an adherent-base analysis," Pet. 2, and that Adkins' rule ignored the "particular circumstances" of the case, Pet. 4. But the Fifth Circuit in Adkins — in language quoted by the court of appeals in this case — made clear that its rule does permit such an analysis:

> "The [*Adkins*] court cautioned, however, that 'our test requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a significant burden on an adherent's religious exercise...."

See Pet. App. 19 (quoting *Adkins*, 393 F.3d at 571).

It is simply untrue that the Fifth Circuit has categorically rejected such a possibility. To the contrary, it has expressly left the door open for a plaintiff to offer such proof in summary judgment. Here, Baranowski failed to offer sufficient evidence to meet his summary judgment burden, and his complaint boils down to a disagreement over the assessment of those facts, not any bright-line legal rule that might warrant this Court's intervention.

B. The Cases Offered by Baranowski Merely Show a Distinction Between Prison Cases and Land-Use Cases, *Not* a Divergence Among the Circuits Regarding Prison Cases.

Baranowski tries to conjure up a circuit split by citing to a number of cases from other circuits that — although they deal with RLUIPA — deal with the context of land-use cases rather than institutionalized-person cases. As those circuits have themselves acknowledged in other decisions, that distinction makes a critical difference. Indeed, three of those circuits have expressly applied a test like the Fifth Circuit's test in regard to institutionalized-person cases. The so-called "split" is really a substantive distinction between different categories of cases and hardly warrants this Court's intervention.

The Ninth Circuit case is explained as a distinction between land-use cases and prison-policy cases. Baranowksi cites to a Ninth Circuit *land-use* case, *San Jose Christian Coll. v. City of Morgan Hill,* 360 F.3d 1024 (9th Cir.2004), in which the court determined that "a substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise." *San Jose,* 360 F.3d at 1034. Subsequent to *San Jose,* however, the Ninth Circuit addressed the prison-policy context. In that case, it did not cite that language from *San Jose* but instead cited with approval to both *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707 (1981) and *Sherbert v. Verner,* 374 U.S. 398 (1963) to conclude that a prison grooming policy

substantially burdened an inmate's religious exercise. *Warsoldier v. Woodford,* 418 F.3d 989 (9th Cir. 2005). "Because the grooming policy intentionally puts significant pressure on inmates such as Warsoldier to abandon their religious beliefs by cutting their hair, CDC's grooming policy imposes a substantial burden on Warsoldier's religious practice." *Id.* (citations omitted)

Baranowksi contends that the Eleventh Circuit's decision in *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied,* 125 S. Ct. 1295 (2005), evidences a circuit split. However, *Midrash* was a land-use case and, since the filing of this petition, the Eleventh Circuit has issued an opinion in a prisoner case which more closely follows the holding in *Thomas.* In *Smith v. Allen,* No. 05-06010, 2007 WL 2826759 (11th Cir. Oct. 2, 2007), a prisoner who claimed to be an adherent of the Odinist faith filed suit after prison officials denied his request to have a quartz crystal. The court defined a "substantial burden" as being "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Smith,* 2007 WL 2826759 * 17 (citing *Midrash,* 366 F.3d at 1227). In order to constitute a "substantial burden" on religious practice, the government's action must be "more than ... incidental" and "must place more than an inconvenience on religious exercise." *Id.* (citation omitted). That is, to constitute a substantial burden under RLUIPA, the governmental action must significantly hamper one's religious practice. *Id.*

Similarly, in a case cited to by Petitioner, the Fourth Circuit cited to *Thomas* when it found that a substantial burden on religious exercise occurs when a state or local government, through act or omission, "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Lovelace v. Lee,* 472 F.3d 174, 187 (4th Cir. 2006), (citing *Thomas,* 450 U.S. at 718).

Although Baranowksi argues that the First Circuit's definition conflicts with the Fifth Circuit, this assertion is incorrect because the First Circuit has not yet ruled on the merits of this issue. In *Spratt v. R.I. Dept. Of Corrs.,* 482 F.3d 33 (1st Cir. 2007), it noted that the district court "decided that a 'substantial burden' is one that 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs. *Spratt,* 482 F.3d at 38 (citations omitted). The First Circuit never addressed the merits, but merely assumed "arguendo that *Thomas* applies." *Id.* Certainly, the First Circuit should be given the opportunity to reach that question squarely before it is deemed to be in such tension with the Fifth Circuit that certiorari would be warranted.

C. As Those More Recent Circuit Decisions Drive Home, the Circuits' View of This Area Is Converging as These Issues Percolate Below.

As the circuits have time to consider a wider variety of cases and this Court's recent guidance, their decisions will converge. What once appeared to be disagreements are being ironed out as circuits work through the different standards that might apply to totally different classes of

cases. Some of the decisions on which Baranowski relies are no longer even the authoritative statement on this subject within their own circuit. Indeed, since the filing of this petition, two new opinions have been issued. The Third Circuit recently concluded that a substantial burden exists where:

1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behaviour and to violate his beliefs. *Washington,* 497 F.3d at 280.[2] Also, as already noted, the Eleventh Circuit issued its opinion in *Smith* on October 2, 2007.

RLUIPA is a new statute, enacted in 2000. Courts delayed reaching the merits of these cases pending the outcome of the Establishment Clause challenge in *Cutter v. Wilkinson,* 544 U.S. 709 (2005). Only a few circuits have yet spoken to the question what constitutes a "substantial burden." Those circuits are becoming more consistent in their approach and have correctly defined the term "in light of the purposes Congress sought to serve," *Chapman,* 441 U.S. at 608, by interpreting cases in light

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[2] The Third Circuit opined that the Fifth Circuit has "enunciated the proper standard" because it incorporates the holdings of both *Sherbert* and *Thomas* while also requiring that the burden on religious exercise be substantial. *Washington,* 497 F.3d at 280 n 7.

of this Court's jurisprudence set out in *Sherbert* and/or *Thomas*. Because these issues need time to percolate, the petition should be denied.

III. In Any Event, the Fifth Circuit's Resolution of This Case Comports with the Statute and With Precedent.

Congress did not define the term "substantial burden" in RLUIPA. However, in a Joint Statement that appeared in the Congressional Record, the section on the definition of substantial burden states that "[t]he Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence." 146 Cong. Rec. S7774, 7776 (July 27, 2000).[3] Because the Fifth Circuit correctly complied with the intent of Congress and has followed Supreme Court jurisprudence, this petition should be denied.

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[3] *See also* Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S.Cal. L. Rev. 845, 853 (1992) ("A fairly common function of legislative history is explaining specialized meanings of terms or phrases in a statute which were previously understood by the community of specialists (or others) particularly interested in the statute's enactment."); *Champman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979) (As in all cases of statutory construction, the task is to interpret the words of the statute in light of the purpose Congress sought to serve.")

In *Sherbert*, a Sabbatarian was refused unemployment benefits when she could not find employment because she declined to work on Saturday. This Court found that a substantial burden exists when a follower is forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." This Court examined this issue again in *Thomas*. Thomas, a Jehovah Witness, was denied unemployment benefits after he quit his job because of his religious beliefs. Citing to *Sherbert*, this Court held that

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Finally, the Fifth Circuit reviewed the decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), a case in which a Native American organization sought to block construction of a road the government wanted to build through an area of public

land used by several Native American tribes. This Court, in denying the plaintiffs' First Amendment claim, rejected their interpretation of *Thomas* and *Sherbert*, because that interpretation implied that "'incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.'" *Id.* at 450-51 (citing *Sherbert*).

The Fifth Circuit has formulated its definition based on the analyses set out in *Sherbert, Thomas* and *Lyng*:

> [A] government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs. *See Sherbert* and *Thomas*. On the opposite end of the spectrum, however, a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is

not otherwise generally available or acting in a way that is not otherwise generally allowed. *Adkins*, 393 F.3d at 569-70 (citing *Lyng*).

Because the Fifth Circuit has complied with Supreme Court precedent, the petition should be denied.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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APPENDIX A

No. 05-20646

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS H. BARANOWSKI
Plaintiff-Appellant
v.
CHAPLAIN LARRY HART; LAWRENCE N. HOGES, Huntsville Unit Warden; TED SANDERS, Rabbi TDCJ Chaplaincy Department; BILL PIERCE, TDCJ Chaplaincy Department; DOUGLAS DRETKE, TDCJ-ID Director
Defendants-Appellees

BARANOWSKI'S PRO SE APPELLANT BRIEF

MAY IT PLEASE THIS HONORABLE APPEALS COURT:

Pursuant to appellate rules for this circuit, Plaintiff-Appellant **THOMAS HUNTER BARANOWSKI** ["Baranowski"] presents this his PRO SE APPELLANT BRIEF in support of his claims summarily denied and dismissed by the Southern District Court at Houston, Texas in the civil rights case numbered 4:03-cv-3893 and styled as above whereafter same was dismissed by the

Honorable John D. Rainey on or about July 15, 2005.

I. JURISDICTION, This is an appeal from the sole adverse judicial decision of the Southern District of Texas to dismiss Baranowski's claims with prejudice. Effective this date, opposing counsel has been served a carbon copy of this brief by general postage delivery.

II. PARTIES: The parties involved in this civil action are identified as, but not limited to the following:

THOMAS HUNTER BARANOWSKI · Plaintiff

LARRY G. HART · Defendant

LAWRENCE N. HODGES · Defendant

BILL PIERCE · Defendant

DOUGLAS DRETKE · Defendant

Many other defendants have been individually and officially and personally and ministerially involved in many instances which occurred at the hands of state officials who are named and/or referred to within the many motions/legal papers contained in the records of this religious litigation brought by plaintiff Baranowski.

III. HISTORY OF THE CASE:

Sometime in 1998 Baranowski advised Texas prison officials that he desired to update his religious affiliation [from NO PREFERENCE to JUDAISM–HEBREW] and further advised unit authorities that he wished to return to his practice of said religion while he was attending Tarleton University's Bachelor Program at the Alfred Hughes unit in Gatesville, Texas. When officials refused to honor his request, Baranowski spoke with then chaplain [James Gallagher] whereinafter he was advised to file an administrative grievance. Soon thereafter Baranowski was transferred to the Mark Michael unit in Tennessee Colony, Texas where he was appointed to act as the coordinator for the Jewish community and permitted to conduct limited weekly–monthly holyday services. Because that unit did not have a four-year college program and because unit supervisors only whimsically allowed services, Baranowski sought a transfer to the Huntsville unit so that he'd be able to attend the Sam Houston State University Bachelor program and participate in religious services since this unit was allegedly designated as a "Jewish–enhanced services unit."

Prior to leaving the Michael unit, however, Baranovski and two other Jewish prisoners filed civil suits in the Houston Court due to the continued denial of Sabbath services. Once Baranowski was transferred to the Huntsville Unit, those issues momentarily became moot and the suit was dismissed without prejudice.

After several months at the Huntsville unit, the newly assigned chaplain [Larry Hart] implemented his personal biases and beliefs whereinafter he began to deny "non–spirit–filled" groups' access to their group services: in particular, adherents of the Jewish, Buddhist, Native American and Jehovah Witness's groups. Effective September 15, 2003, Defendant/Appellee Hart used the excuse that these groups did not have an outside volunteer to conduct services, therefore, services were discontinued.[1]

Inasmuch as Baranovski had made exhaustive attempts to informally resolve the problems, unit administrators continued to deny and deprive Jewish prisoners access to Sabbath services. Having been unsuccessful in his plight, Baranowski contacted the Department of Justice Civil Rights Division and Southern District Judge Vanessa Gilmore with a laundry list of violations afterwhich Judge Gilmore instructed the Court Clerk to file and generate Baranowski's religious claims under Baranowski v. Hart, et al., No. H-03-3893, effective September 13, 2003 and same was, because of judicial rotation, assigned to Judge John D. Rainey and Magistrate Nancy Johnson.

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1 Just as prisoners of the Muslim and Jehovah Witness' faith groups, Jewish prisoners attending services have a Rabbinical–approved coordinator assigned to lead Jewish prisoners in prayer services. in line with Hyde v. TDCJ, 948 F. Supp. 625 (S.D. Tex. 1996) and Brown v. Beto. It should also be noted here that back around 1990, Jewish prisoners were bused to the Hunstville unit for inmate–coordinator led prayer services, without official interference.

IV. FACTS OF THE CASE:

Baranowaki's general civil rights complaint shows that he and approximately twenty (20) prisoners of the Jewish faith are routinely being:

[A] denied access to Jewish Sabbath and other Holy Day services as mandated by the Code of Jewish Law.

[B] deprived of Jewish prayer service–fellowship as set forth under the Code of Jewish Law.

Baranovski declares that on each and every Jewish Sabbath [Friday] during the months of September and October 2003 and on each and every Saturday [Havdalah) during the months of October, November, December and thereafter, Jewish prisoners confined to the Huntsville unit were being denied access to the unit chapel to attend and celebrate Jewish services and were deprived of access and participation in Jewish prayer and fellowship, all of which discriminates against Jewish prisoners in keeping with their sincerely held beliefs and adherence to their religion [Judaism]. Furthermore, Jewish prisoners have been denied and deprived of celebrating High Holy Day services as revealed and supported in their individual administrative grievances on file and available through discovery.

[C] discriminated against by prison officials and other state agents.

[D] denied and deprived of proper, nutritious and adequate kosher foods consistent with mandates of the Code of Jewish Law regarding keeping kosher.

Jewish prisoners have been and continue to be denied and deprived access to proper dietary needs of appropriate caloric intake, for example: denial of a 25-hour fast of Yom Kippur on October 25-26, 2003]. These particular actions by Texas prison officials sorely discriminates against Jewish prisoners confined in and around the State of Texas. Prisoners are denied and deprived of kosher diets that conform with their religious beliefs– daily kosher diet as well as supplemental diets required for Jewish holydays. These dietary needs, Baranowski contends, contributes to the survival of Jewish people and, are utilized as a tool for discipline, helping to induce self–control and curb impulsive behavior, all of which are in line with the rehabilitative needs for all prisoners [Texas prison officials profess their intent to 'rehabilitate' offenders].

V. ISSUES FOR DE NOVO REVIEW:

In the interests of justice, plaintiff THOMAS HUNTER BARANOWSKI seeks de novo review of his civil rights claims, declaring that evidence would show as follows:

[1] the district court abused its discretion when it failed to:

(a) grant a Temporary Restraining Order, twice.

(b) grant Appointment of competent counsel, twice.

(c) grant an evidentiary hearing, twice.

(d) grant plaintiff an opportunity to file his Motion For Summary Judgment after the United States Supreme Court declared RLUIPA constitutional.

[2] the district court abused its discretion by dismissing the civil action without allowing an evidentiary hearing so Baranoweki could present evidence in support of the issues in his complaints.

[3] the district court erred in its decision by denying both parties of their day in Court which they could legally demand under federal rules.

[4] the district court abused its authority when it plainly rubber–stamped the defendants generalized summary judgment without allowing plaintiff the opportunity to "flesh-out" any unresolved issues contained within this suit [e.g. facts of Jewish Law[2]].

[5] the district court erred in its decision when it systematically dismissed Baranowski's suit without truly testing the validity of the defendants Motion For Summary Judgment which contained misrepresented

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2 The Jewish Sabbath begins each week on Friday at sunset and ends twenty-four (24) hours later on Saturday (Havdalah) at sunset. Pursuant to Jewish custom, Jews are commanded to observe the Sabbaths and High Holy Days "in all your dwelling places . . . as a perpetual status . . . throughout your generations." SEE Leviticus 23:3,8,14,21,31,41. JUDAISM, the very first religion to teach belief in one God, is the religion of one people – the Jews. Ethically speaking, Judaism teaches that all people are created in God's image and deserve to be treated with dignity and respect. Jews are and have always been held to a stricter standard of religious observance. Even in prison.

information contrary to agency policy.

DISCUSSION

In this case, Baranowski understands that the First Amendment of the United States Constitution states:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for redress of grievance.

In theory, the Government may neither aid nor hinder the practice of a particular religion. Specifically, the First Amendment forbids an official purpose to disapprove of a particular religion or of religion, Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S.Ct. 2217, 2226 (1993). In the instant case, the prison officials genuinely promote the attendance of Christian–Catholic religions while interfering and hindering Jewish prisoners access to their mandated Sabbath (Friday)–Havdalah (Saturday) services. Even more serious is the fact that defendant Hart has impeded Jewish prisoners' free exercise of religious rights by refusing to accomodate an appropriate place of worship to conduct Jewish services.

Under the clear language of 42 U.S.C. Section 1983 and the Religious Land Use and Institutionalized Persons Act ["RLUIPA"), Baranowski has repeatedly shown that he and other Jewish prisoners are being denied and deprived of a guaranteed right by a person [or persons] acting under the color of state law. Many courts too, have held that a

convicted felon does not forfeit all constitutional protections because of his or her confinement in prison.

This Court must be alert to this factor as announced in Meachum v. Fang, 427 U.S. 215, 224-225 (1976). The claims which Baranowski herein raises create a "substantial burden" over his free exercise of religion.

As Baranovski has clearly stated in his administrative grievances, on–going civil rights complaints and advisory motion practice, the respondent prison officials have violated civil rights statutes by failing to accomodate Jewish prisoners' exercise of their religion in so many ways. And, to add insult to injury, the district court condoned these actions by "rubber–stamping" the said conduct as well as the respondents motion for summary judgment, thus evading the plaintiff's continuous claims of denial, deprivation and discrimination by state prisons officials. Baranowski relies on recent Supreme Court decisions to stand up for his plight to have the "substantial burdens" of religious discrimination lifted from Texas prisons. See e.g., Cutter v. Wilkinson, 125 S.Ct. 2113, 2115 (2005). ["The exercise of religion often involves not only belief and profession but the performance of ... physical acts such as assembling with others for a worship service or participating in sacramental use of bread and wine ..."] with Van Orden v. Perry, No.03-1500 (Decided June 27, 2005) ["Purpose of the First Amendment is to assure the fullest possible scope of religious liberty and tolerance for all"] and McCreary County v. ACLU, No.03-1693 (Decided June 27, 2005) [" ... that liberty and social stability demand a ...

tolerance that respects the religious views of all citizens"].. Unlike the defendant's [Hart] personal view that Jewish prisoners are a "non–spirit–filled" group, the above three cases reveal that the Supreme Court Justices consider "Jewish and Christian faiths" akin for constitutional protections. In the case before this Court, Baranowski reveals that the government [has] acted unconstitutionally" when it denied and deprived Jewish prisoners of their "right" to worship and congregate according to the tenets of their chosen religion— JUDAISM.

Once again, the district court took the official word of Texas prison officials over the pleas of help from Texas Jewish prisoners. Respondent are forcing Jewish prisoners to break the [Jewish] law of "no Sabbath breaking" whenever they deny and deprive Jewish prisoners the mandate to worship and congregate, all of which are discriminatory factors which cannot be permitted by the Court. Baranowski's original and supplemental legal papers show evidence of the moral and religious obligations Jewish prisoners are due by the State. The State of Texas receives federal funding to assist them in"federally funded programs", yet, when private [Jewish] organizations provide these prisoners with kosher foods at no–cost to the prison, state officials deny and steal these foods under the guise of security precautions. See EVIDENCE [TDCJ-CID] Grievance Nos. 2005153259 (baranowski) 2005153250 (white); 2005153245 (turner); 2005153242 (talamantes) and Complaints filed with Walker County District Attorney's Office regarding theft.

Further signs of discrimination by state officials could be evidenced when, just within the last month Christian faith group, KAIROS catered privately–funded meals to about 34 Texas prisoners over a three–day period without hesitation. Yet, whenever an established and approved Jewish organization provides Kosher food for its Jewish prisoners, Texas prison officials denied same for "security reasons". Baranowski contends and, evidence would prove that his requests for religious accomodations have not been excessive, nor do they impose unjustified burdens on the state or other institutionalized persons, and certainly do not jeopardize TDCJ-CID's effective functioning. See Cutter v. Wilkinson, 544 U.S. at 2116. See also, Benning v. Georgia, 391 F.3rd 1299, 1307 (CA11, 2004) ["Congress has every right to ensure that the state prisons that accept federal funds respect the religious freedom, of prisoners and promote their rehabilitation"].

Recently, and continuously, the Courts have held that "[T]he framers of the United States Constitution incorporated substantial religious protections into Article VI and the First Amendment of the United States Constitution to prevent religious discrimination". Moreover, when persons are excluded from participation in our democratic processes because of race, religion or gender the promise of equality dims and the integrity of our judicial system is jeopardized. See Casarez v. State, 913 S.W. 2d 468, 476, 481 (TCA 1994) (citing Swain v. Alabama, 380 U.S. 202, 220 (1965) and Sherbert v. Verner, 374 U.S. 398, 403-09 (1963)).

Baranowski's right to the free exercise of religion is unquestionably a fundamental right and any impairment [ergo, interference] is subject to strict scrutiny review. Texas, of all States, cannot shed its responsibilities to Jewish prisoners, especially when the Fourteenth Amendment to the United States Constitution protects Jewish prisoners, Cantwell v. Connecticut, 310 U.S 296, 296, 303 (1940).

Prison policies do substantially burden Baranowski's attempts to maintain a kosher diet and practice his chosen religion. Such burden puts substantial pressure on him to modify his behavior and to violate his sincerely held religious beliefs. Refer to: Thomas v. Review Board, 450 U.S. 707, 717-18 (1981); Kahane v. Colson, 527 F.2d 492 (CA2 1975) [First Amendment requires Orthodox Jewish prisoner receive a kosher diet].

Baranovski maintains that as a sincerely Torah–observant Jew, he is compelled by Judaism to adhere to Jewish law, consume kosher food, observe the Sabbath and other prescribed holy days and perform specific rituals, none of which interfere with or compromise prison security. These mandates also further his successful rehabilitation, something Texas prisons supposedly encourage.

Contained within his original civil rights complaint Baranowski demanded a jury trial. In their reply, the defendants also demanded "trial by jury". Inasmuch as the issues are ripe for a trial by jury, the defendants sought dismissal in any manner possible, first by saying that the Establishment Clause was unconstitutional, then by filing summary judgment motions. The lower court naturally obliged the respondents.

The district court had the opportunity to weigh and consider the precious nature of Baranowski's concerns. Judge Rainey, however, decided to partner–up with the Texas prison system—the same system that has steadily been under close scrutiny for its known abuse and serious violative animus and nature. That particular court, again, overlooked Baranowski's RLUIPA claims.

This Court of Appeals, especially, has the power and authority to correct the lower court's abuse of discretion and erroneous decision–making process.

There can be no doubt that Baranowski has made a prima facie case of religious discrimination by prison officials that have denied and deprived Jewish prisoners of their 'right' to practice their sincerely held belief protected by the First Amendment. Based on newly-enacted legislation which was recently upheld by the Supreme Court, RLUIPA protects the religious rights of prisoners and their right to religious services, kosher food, work–proscription days, observance of holydays and so forth. See Cutter v. Wilkinson, supra.

CONCLUSION

On Sunday, August 17, 2003, Texas prison chaplain Larry Hart made a discriminatory remark claiming that he intended to discontinue all non–spirit filled group services on the unit" after which he cancelled all existing religious services for Jewish, Buddhist, Native American and Jehovah Witness prisoners. Furthermore. together with the chaplain, Huntsville Unit officials denied and deprived Jewish prisoners of their Sabbath/Havdalah services, congregational worship–fellowship, access to holyday festival services and, of course, religiously mandated kosher food. Many other state prison officials fell into complicity with the defendant named inside this suit.

After filing internal complaints and exhausting administrative grievances, Baranowski sought federal intervention and a civil suit was filed. During the initial process, both parties demanded a jury trial, however, despite extensive motion practice, the district court granted defendants summary judgment and dismissed the suit with prejudice. Baranowski timely appeals the adverse decision of Judge John D. Rainey.

Based on case law and court decisions, Baranowski sincerely believes that the district court erred in its decision and further abused its discretion when it:

(a) failed to grant the parties their day in court.
(b) refused to grant the parties demand for a jury trial.

(c) denied plaintiff's motions for Temporary Restraining Order(s), Appointment Of Counsel and Evidentiary Hearing(s); twice.
(d) violated plaintiff's civil rights protections under RLUIPA and the First Amendment.
(e) condoned defendants civil rights violation of Jewish prisoners.
(f) selectively accepted defendants version of events over plaintiffs' evidence.
(g) refused to allow the plaintiff to file responsive Motion For Summary Judgment before granting defendants' Motion For Summary Judgment.
(h) refused to permit Magistrate Judge Nancy Johnson to hold an evidentiary hearing so the parties could "flesh-out" issues for trial by jury.
(i) denied appointment of counsel for plaintiff so as to protect the rights of plaintiff on issues triable by a jury.
(j) denied appointment of counsel [oe even stand-by counsel] to assist plaintiff to file motion for summary judgment.

FOR THESE REASONS, and more, Baranowski is of the opinion that this Honorable Court of Appeals should REVERSE the adverse decision and judgment of the lower district court and REMAND this civil suit to the district court with instructions for REAPPOINTMENT of an unbiased judge and APPOINTMENT of competent civil trial counsel to represent and/or assist Baranowski and other Jewish prisoners so that they may proceed to a jury trial.

EXECUTED on this the 30th day of September, 2005 and declaring under the penalty of perjury that the foregoing facts are true and correct and further stating that a true carbon copy of this instrument has been sent to: HON. JOHN M. ORTON, P.O. Box 12548, Austin, Texas 78711.

Respectfully submitted,

/s/ Thomas Hunter Baranowski
THOMAS HUNTER BARANOWSKI
Pro Se Plaintiff-Litigator
815 – 12th Street
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Thomas H. Baranowski
378384
Huntsville Unit
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February 17, 2006

Hon. Charles R. Fulbruge, Clerk
U.S. Court of Appeals, Fifth Circuit
600 Camp Street, Room #102
New Orleans, La. 70130

RE: Baranowski -v- Hart, et al
USCCA No. 09-20646
CA. NO. H-03-3896 (Houston)

LETTER REPLY OF PLAINTIFF – APPELLANT

MAY IT PLEASE THE HONORABLE JUDGE OF THE COURT:

Plaintiff–Appellant Thomas H. Baranowski ["Baranowski"] submits this letter of reply in similar fashion answer to the letter brief filed by Defendants–Appellee and in support, Baranowski would present as follows:

OPENING STATEMENT

The main question this Honorable Court of Appeals should ask itself is: If the State of Texas and the

Department of Criminal Justice ["TDCJ"] are not violating the constitutional rights of Jewish prisoners, then why is their reply to Baranowski's appeal brief before this Honorable Court full of half– truths and blantant lies?

Baranowski asserts that this is the main reason that only a trial with sworn testimony shall put theses matters to the test and the perjurious presentations before the Court for sanctions and penalties.

A wise man once said, "Defense is complicated when truth and falsehoods are established," and "twisted words made to appear in the worst light, is the most subtle form of attack". It should be noted here that the State officials fighting against the constitutional rights of Jewish prisoners have raised these observations to the highest art.

Time – after – time, for years, and motion – after – motion, Baranowski has shown the nefarious attitudes of the Lone Star State of Texas Attorney General and its subordinates. It makes anyone wonder why this state leader or the state prison officials goforth before the Courts with such tenacious falsities.

Either the Attorney General is lying to the Court OR the defendants are lying to the Attorney General Or, BOTH! And, Baranowski makes that assertion based on the following facts which can be verified by the legal paper contained in this lawsuit.

-A-

FROM THE OUTSET Baranowski raised three particular constitutional issues, those being: denial of due process rights to practice his Jewish faith and deprivation of equal protection to hold and attend mandated Jewish services each and every Sabbath and, the defendants deliberate discrimination of Jewish prisoner.

Baranowski filed his lawsuit on the premise of these three grounds, seeking protection of the Federal courts for the ongoing constitutional violations by anti-semetic prison officials. The district court, instead, denied Baranowski's in depth motion practice, despite documentation, official complaints and witness affidavits which, at trial, would have shown major constitutional violations on the part of Texas prison officials. Purely, the defendants animus to prejure themselves is a customary practice both in and out of the judicial system. Lets see how Baranowski can prove up his contentions.

1...Of late, in their letter brief, defendants advise this Honorable Court of Appeals that they have limited resources and cannot provide requested Jewish services (page 5).

In the rebuttal, trial testimony would prove that christian services are conducted throughout the weeknights, on Saturday, and four times on Sunday. Muslim services are provided twice on Friday and Saturday and these adherants are granted showering provisions in accordance with their faith.

Jewish prisoners, however, are denied and deprived of opening and closing Sabbath services and showers thereafter, all at the hands of anti–semetic prison personal.

State officials argue that Jewish Rabbis and outside volunteers are not available to "facilitate" and/or conduct scheduled religious activities. It is a well–known fact that a rabbi is not allowed to travel on holy days. See District Court Motion Advisory to the Court.

Inasmuch as Jewish prisoners are able to conduct services in the noisy education department, they do so under the indirect supervision of their rabbi via ritual prayer book, The Tehillat Hashem. Realistically through, prison officials have denied and deprived Jewish prisoners of services since September 05, 2003 to the present day. The State Attorney General and defendants have buried these matters, raising a literal smoke screen of bygashery to cover their constitutional violations of Jewish prisoners. This Honorable Court of Appeals should avoid being taken hostage by the Lone Star State of Texas' half–truth.

2... Contrary to the appellees response (page 5, 6) the New Birth (Christian) Bible programs is not held in the unit chapel every Friday night; trial testimony would reveal, for example, that there were not services in the chapel of hope on either February 3rd. Or 10th., 2006 due to lack of security (although five prison officials were playing basketball on the yard). Jewish prisoners were still denied and deprived Sabbath holyday services in the

chapel. Friday is a holy day for jewish prisoner while just another day for Christian offenders; to deny the privacy and intimacy of the Jewish mandated holyday is to violate constitutional protection entitled to Baranowski and other Jewish prisoners.

3... Throughout this civil action, the legal papers submitted to state and federal officials, and the charges presented to local state attorneys, Baranowski has made a good faith effort to relay said violations of state prison officials. The district court allowed the officials to lie, cheat and yes, even steal kosher food products for Jewish prisoners. Other federal district courts have acted, without hesitation. Not in Texas though.

Every court of Appeals in the federal system has ruled infavor of Jewish prisoners in regards to providing kosher diets, regardless of its cost, e.g., Florida has to provide kosher meals for even one Jewish prisoner while Ohio ordered the state to deposit funds into a prisoner's account for kosher food in the prison canteen.

The Loan Star State of Texas admits that "Aleph Institute in Florida provides kosher food at no cost to the State". Yet, at Passover of 2005, when Jewish prisoners ordered food for the eight days of Passover, they had to eat <u>all</u> of the food at one setting and could not take the kosher food back to their cells (as previously done for years), therefore, teh remainder of the food was taken by prison officials, despite prior approval. Despite Jewish prisoners complaints of theft to the local district attorney, the attorney general, and the district judges, the food was

either destroyed or given to other inmates favored by prison officials. A trial at the federal courthouse would have raised these issues and revealed the many constitutional violations suffered by Baranowski and other Jewish prisoners.

4... Prisoner of the christian and muslim faiths are genuinely pampered in Texas prisons while Jewish, Buddhist and Native Americans adherents are hassled and/or discriminated against for trying to practice their own faith of choice. There is <u>always</u> an excuse in Texas prisons.

Prison officials push forth the excuse that if they have to provide kosher food for Jewish prisoners, other population inmates would complain and/or seek equality in food rationing. They, of course, say nothing of prisoners who have the means to go to the unit commissary every two or three days and return to the cell block with (several) days worth of food for their consumption. Once again, prison officials (defendants – assistant attorney general) only reveal half–truths. May the best fib win? The district court believed the defendants ill – willed documents while pushing legal papers filed by Baranowski to the side. Jewish services were, for many years, available on the opening and closing of the Sabbath. But, since the arrival of the new regime of anti-semetic prison officials. Jewish prisoners must fight for the rights, constitutionally guaranteed.

·B·

The Lone Star State of Texas defendants, through counsel, declare that Baranowski's allegations of religious discrimination are conclusory and insufficient to defeat the Appellee's motion for summary judgment (page 8). If given equal opportunity to a jury trial, then Baranowski would summarily defeat such contentions by way of testimony and prison documents and grievances. The defendants don't want that, else they too would have stood by the their original demands for jury trial. Plainly shown, Baranowski has not been given a chance to present real evidence to support his wholesome claims.

·C·

Now how misleading are the defendants when, in their letter brief, they present to the Court, as follows: [at page 3]

"He [Baranowski] also asserted, "kosher food is a must in the Jewish religion and cost should not be a factor. As long as the country sentences people to prison, they have to keep up with the religious freedom act and supply no matter what the cost the Kosher food required . . ."

Once this Court of Appeals reviews Baranowski's response [at page 5], it can be seen that the counsel for defendants took the aforementioned quote out of context. Baranowski did not "assert" the above statement. President George Bush made this comment; no where do defendants give credit to their former Governor on the

issue of providing kosher food to Jewish prisoner. The President acknowledges kosher food a must for Jewish prisoners.

If the federal government will not stand up for Jewish prisoners, and the Texas Governor will not abide by what this nation's president dictates, who will stand in the gap for Baranowski and other Jewish prisoners. It is with sincere hope that ths Court of Appeals will step up to the plate and defend Texas Jewish prisoners as equally as other states courts of appeals have done.

CONCLUSION

Baranowski is of the opinion that he is entitled to relief on the issues presented within this litigation, prepared and depended in good faith for the past twenty nine months. Upon that belief Baranowski prays that this Honorable Court of Appeals will REVERSE the judgment of the district court and REMAND this cause to a court of proper jurisdiction thereafter appointing stand-by-counsel to represent this suit before a trial by jury.

EXECUTED on this the 17th day of February, 2006 and declaring under the penalty of perjury that a copy of this instrument has been served upon opposing counsel of record by U.S. Mail.

Respectfully submitted,

/s/ Thomas Hunter Baranowski
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APPENDIX B

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS H. BARANOWSKI	§	
	§	
Plaintiff-Appellant,	§	No. 05-20646
	§	
and	§	
	§	
ALEPH INSTITUTE	§	
	§	INTERVENOR-APPELLANTS' MOTION TO INTERVENE
and	§	
	§	
JEWISH PRISONER SERVICES INTERNATIONAL	§	
	§	
Intervenor-Appellants,	§	
	§	
v.	§	
	§	
CHAPLAIN LARRY HART, et al.,	§	
	§	
Defendants-Appellees.	§	

INTRODUCTION

Proposed Intervenor–Appellants Aleph Institute ("Aleph") and Jewish Prisoner Services International ("JPSI") respectfully move this Court to allow them to intervene for the sole purpose of submitting to the panel the proposed Petition for Panel Rehearing and Suggestion of Mootness also filed today.[1] Intervenors meet the standard for intervention: they filed this motion as soon as they were aware of the case, and with enough time for the Court to act; Intervenors have a great stake in the outcome of the litigation that will be adversely affected without intervention; and their interests have not been adequately represented by either Baranowski or TDCJ.

Moreover, the Court should allow intervention because the Petition identifies two reasons that this Court lacks jurisdiction to hear the appeal or issue the mandate. First, in September 2006—after this case had been briefed but before the Court's opinion issued—Baranowski changed his official TDCJ religious affiliation from "Jewish" to "none." Therefore, since at least September 2006, Baranowski has lacked standing to bring any of his claims, and this Court has no jurisdiction to hear the appeal. Second, TDCJ has already started providing the Jewish religious accommodations that Baranowski sought—kosher diet and weekly Sabbath services—so

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1 Intervenors note that they would have sought intervention at an earlier stage of the appeal had they been aware of its existence or the fact that Plaintiff no longer claims to be Jewish. Intervenors first learned of the appeal form the Court's May 4, 2007 opinion.

these claims are moot. At the very least, Intervenors ask the Court to rehear the case to provide a sounder factual footing for its decision.

BACKGROUND

Baranowski, a sex offender and a convert from Catholicism to Judaism, filed his *pro se* lawsuit in the Southern District of Texas on September 19, 2003. Judge Rainey granted summary judgment against him on July 15, 2005. Baranowski filed a notice of appeal on August 3, 2005, and briefing to this Court was completed on March 13, 2006.

Baranowski changed his official religious affiliation within TDCJ from"Jewish" to "none" on September 28, 2006, but apparently neither he nor TDCJ notified the Court of this fact. *See* attached Declaration of Bob Moore at ¶ 5. On May 4, 2007, this Court issued its opinion, unaware of Baranowski's change of religious affiliation. Intervenors first became aware of Baranowski's lawsuit when the Court issued its opinion.

While it was briefing this appeal, TDCJ was defending a separate lawsuit seeking a kosher diet for observant Jewish prisoners, *Moussazadeh v. Texas Department of Criminal Justice* et *al.,* No. 9:05-cv-197, E.D. Tex. (filed Oct. 11, 2005). The Eastern District of Texas stayed *Moussazadeh* on April 4, 2006, based on TDCJ's indication that it would consider providing kosher food to Jewish inmates. *See Moussazadeh,* Dkt. No. 55. Since that time, the parties in the *Moussazadeh* case have worked slowly towards a settlement based on TDCJ's provision of kosher

food to observant Jewish prisoners. TDCJ has now set up a kosher kitchen at the Stringfellow Unit outside Houston, determined which Jewish prisoners are kosher–observant, and transferred most of those 30 prisoners to the Stringfellow Unit.[2] As part of its more recent efforts to provide religious accommodations to observant Jewish prisoners, TDCJ is also providing weekly Sabbath services to Jewish prisoners at the Stringfellow Unit. *See* Pet. at 3.

TDCJ's actions and submissions to the District Court for the Eastern District of Texas in the *Moussazadeh* case indicate that many of the main facts relied on by this Court in the May 4 opinion were simply false at the time the Court relied on them. For example, TDCJ documents show that the cast of setting up a kosher kitchen at Stringfellow has been $8,06626, rather than the larger amounts hinted at in the affidavit of Billy Pierce dated October 22, 2004 ("Pierce Affidavit") and relied on heavily by the Court in its May 4 opinion. See Pet. at 4. Moreover, the draft kosher menu submitted by TDCJ as evidence in a hearing last month in Tyler before Magistrate Judge Guthrie indicates that pre–packaged kosher meals will cost at most $2 99, rather than the $15 referred to in the Pierce Affidavit.[3] See Pet. at 4. Finally, TDCJ's concern that providing a special religious diet to some prisoners

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2 Baranowski was presumable not eligible for transfer because he had already changed his official religious affiliation from "Jewish" to "none" by the time of the transfers earlier this year.

3 Pierce's conclusion were, from the face of his affidavit, based on hearsay from the Florida Department of Corrections rather than any independent investigation.

would make other prisoners resentful—a concern relied on by this Court in the May 4 opinion—is now moot since TDCJ is already providing kosher food to observant Jewish prisoners at the Stringfellow Unit. And so far TDCJ has only had to set up one kitchen rather than the several claimed in the Pierce Affidavit. *See* Pet. at 4. TDCJ is also in the process of changing its Jewish religious accommodation policies in other ways, creating "Enhanced Jewish Designated Units" and "Basic Jewish Designated Units." See Pet. 4.

The Court thus has before it an appeal by a prisoner who is no longer Jewish seeking accommodations for Jewish prisoners that TDCJ has already begun providing to its prisoners who are actually Jewish.

INTERVENORS

Intervenors are especially well-placed to brief this court on Jewish religious accommodations in prison, since they are the leading non–profit organizations providing religious services to Jewish prisoners nationwide.

The Aleph Institute is a not–for–profit, national Jewish educational, humanitarian and advocacy organization founded in 1981 by Rabbi Sholom D. Lipskar at the direction of Rabbi Menachem M. Schneerson, the Lubavitcher Rebbe, of blessed memory. Aleph helps Jewish prisoners and their families maintain essential connection to each other and to their spiritual heritage, and provides educational materials to children of Jewish prisoners, counseling to spouses, parents and children,

and financial assistance to families in need. Accordingly, Aleph has a direct interest in how Jewish religious practice is treated in state and federal prisons.

In furtherance of this mission, Aleph cooperates with TDCJ, by providing certain kosher items to Jewish prisoners in TDCJ at Jewish holidays, and by aiding TDCJ's Chaplaincy Department (upon request) in determining whether prisoners are Jewish, and what religious accommodations to provide Jewish prisoners.

Led by Chaplain Gary Friedman, Jewish Prisoner Services International originated as an agency of B'nai B'rith International and was restructured nine years ago into a separate non–profit chaplaincy service. JPSI works in conjunction with all major branches of Judaism and the Jewish Community's other social services agencies to assist Jewish prisoners and their families world–wide. In addition to conducting its own programs, JPSI provides support to localized Jewish chaplaincy programs and its extensively involved with various corrections industry organizations.

Both Intervenors strongly feel that the rights of Jewish prisoners should not be determined by someone who no longer even claims to be Jewish. The Court's May 4 opinion, if not vacated, could make it significantly more difficult for Intervenors, their members and their volunteers to provide services to religious Jewish inmates across the country. In addition, the opinion could be relied on by other courts or agencies as support for the idea that Jewish religious accommodations are too expensive or

to cumbersome provide. In fact, TDCJ's actions over the last year demonstrate that it is not too expensive or cumbersome for TDCJ to provide Jewish religious accommodations such as weekly Sabbath services and a kosher kitchen.

ARGUMENT

To intervene under the FED. R. CIV. P. 24(a) standard,[4] a proposed intervenor must satisfy four elements:

> (1) the application for intervention must be timely, (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Ford v. *City of Huntsville,* 242 F.3d 235, 239 (5th Cir.

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4 The Fifth Circuit allows intervention on appeal. *See, e.g., Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237, 1239 (5th Cir. 1986) (allowing intervention on appeal due to intervenor's "obvious vital interest"). Courts of Appeals typically apply the FED. R. CIV. P. 24(a) standard to determine whether to grant intervention on appeal. *See, e.g., Baker v. Wade*, 743 F.2d 236, 240-44 (5th Cir. 1984) (applying Rule 24(a) standard to motion to intervene on appeal); *Northeast Ohio Coalition for Homeless v. Blackwell*, 467 F.3d 999, 1007 n.2 (6th Cir. 2006) (same).

2001). Intervenors meet all four of these elements.

Under the first element, timeliness, there is another four-factor test:

> (1) the length of time during which the would–be intervenor actually knew or reasonably should have known of its interest in the action before petitioning for leave to intervene, (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would–be intervenor's failure to apply for intervention as soon as it actually knew or reasonably should have known of its interest in the action, (3) the extent of the prejudice that the would-be intervenor may suffer if its petition for leave to intervene is denied, [and] (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Stallworth v. Monsanto, 558 F.2d 257, 264–66 (5th Cir. 1977). The application of these factors is "contextual": [t]he requirement of timeliness is not a tool of retribution to punish the tardy would–be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner. Federal courts should allow intervention 'where no one would be hurt and greater justice could be attained.'" *Sierra Club v. Espy,* 18 F.3d 1202, 1205 (5th Cir. 1994) (quoting *McDonald v. E.J. Lavino Co.,* 430 F.2d 1065, 1074 (5th Cir. 1970)).

Here, Intervenors meet all four timeliness factors. Intervenors only knew of this action after the Court published its opinion on Friday, May 4. Only 14 days have passed since that decision was published.

The second factor of the timeliness test, "the extent of prejudice to the existing parties as a result of the applicant's delay in seeking intervention," "must be measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervenor to participate in the litigation." *Sierra Club,* 18 F.3d at 1206. Neither Baranowski nor TDCJ have been prejudiced by what has occurred in the 14 days that have passed since the Court filed its opinion. Moreover, no prejudice is possible, since Baranowski no longer claims to be Jewish, and TDCJ is already starting to provide Jewish prisoners the religious accommodations he requested.

Under the third timeliness factor, Intervenors will be greatly prejudiced if the intervention is denied, since their ability to minister to observant Jewish prisoners will be limited in the Fifth Circuit and else where if the opinion is not vacated.

And with respect to the fourth factor, there is a very "unusual circumstance" here. Both of the parties were aware of the facts that would deprive this Court of jurisdiction over this appeal—i.e., that Baranowski was no longer Jewish and that TDCJ was taking steps to provide the Jewish accommodations in the suit—but did not provide the Court with this information. Because

neither of the parties informed the Court of facts that would deprive this Court of jurisdiction, it falls to Intervenors, who only just learned of this appeal at all, to inform the Court of these facts.

Since they meet all four of the *Stallworth* factors, Intervenors timely filed this motion to intervene. This Court should allow intervention because no "one would be hurt and greater justice could be attained." *Sierra Club,* 18 F.3d at 1205.

Intervenors also meet the other three elements of the Rule 24(a) test. The second element is met because Intervenors have a "direct, substantial, [and] legally protectable" interest in ensuring that a kosher diet, weekly Sabbath services, and other Jewish religious accommodations are provided to the Jewish prisoners they minister to. *Sierra Club*, 18 F.3d at 1207. Not only do they have an interest on behalf of the prisoners they assist—they also have an interest on behalf of their members and volunteers, for whom helping Jewish prisoners keep religion is a mitzvah. *Cf. Supreme Beef Processors, Inc. v. United* States *Dept. of Agriculture,* 275 F.3d 432, 437 n.14 (5th Cir. 2001) ("application of a performance standard that affects intervenor's] members" constitutes protectable interest under Rule 24(a)).

The third element is that Intervenors "be so situated that the disposition of the action may, as a practical matter, impair or impede [their] ability to protect [their] interest." *Ford,* 242 F.3d at 239. Here, the precedential effects of the Court's opinion standing alone constitute an impairment to the Intervenors 'interest:' "an intervenor's

interest 'is impaired by the *stare decisis* effect of the district court's judgment.'" *Sierra Club,* 18 F.3d at 1207.

The fourth element, inadequate representation, constitutes a "'minimal'" burden on Intervenors. *Sierra Club,* 18 F.3d at 1207 (quoting *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n.10 (1972))."The applicant need only show that representation may be' inadequate." *Id.* The mere fact that neither Baranowski nor TDCJ informed the Court that he no longer claimed to be Jewish demonstrates inadequate representation. The same is true of the failure of either party to inform this Court of TDCJ's policies concerning Jewish accommodations.

Intervenors have met all four elements of the *Stallworth* test for intervention.

CONCLUSION

For the foregoing reason, Intervenors respectfully request that the Court grant the Motion to Intervene and allow the proposed Petition for Panel Rehearing and Suggestion of Mootness to be filed.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I have this 18th day of May 2007 served a true and correct copy of the above and foregoing upon the following persons by placing the same in the U.S. Mail, with sufficient first class postage to assure delivery and addressed as follows:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS H. BARANOWSKI	§	
	§	
Plaintiff-Appellant,	§	No. 05-20646
	§	
and	§	
	§	
ALEPH INSTITUTE	§	
	§	INTERVENOR-
and	§	APPELLANTS'
	§	PETITION FOR
JEWISH PRISONER	§	PANEL
SERVICES INTERNATIONAL	§	REHEARING
	§	AND
Intervenor-Appellants,	§	SUGGESTION
	§	OF MOOTNESS
v.	§	
	§	
CHAPLAIN LARRY	§	
HART, et al.,	§	
	§	
Defendants-Appellees.	§	

INTRODUCTION

Intervenor-Appelleants Aleph Institute ("Aleph") and Jewish Prisoner Services International ("JPSI") respectfully petition this Court for panel rehearing under FED. R. APP. P. 40, suggest mootness of the appeal, and request that the Court vacate its opinion dated May 4, 2007, vacate the judgment of the district court, and dismiss the appeal for lack of jurisdiction. There are two reasons this Court lacks jurisdiction over this appeal.

First, Plaintiff–Appellant Thomas Baranowski declared himself no longer Jewish in September 2006, six months after briefing in this case was completed, and eight months before this Court rendered its decision on his appeal. Since the appeal was based solely on his requests for accommodation of his claimed Jewish religious beliefs, once he decided he was no longer Jewish, he lost standing, and this Court lost jurisdiction to hear his appeal. Neither Baranowski nor Appellees–Defendants informed the Court of this jurisdictional fact.

Second, since briefing was completed in May 2006, the Texas Department of Criminal Justice ("TDCJ") has begun providing all of the accommodations Baranowski sought, including a kosher diet for observant Jewish prisoners, and weekly Sabbath services at an "Enhanced Designated Jewish Unit."This directly contradicts TDCJ's arguments to this Court and the district court that it could not provide these accommodations. In any case, since the relief sought has been provided by TDCJ, this appeal is moot, and the Court lacks jurisdiction over the appeal. The Court should therefore vacate its decision and the district court's and dismiss the appeal for lack of jurisdiction.

BACKGROUND

Baranowski, a sex offender and a convert from Catholicism to Judaism, filed his *pro se* lawsuit in the Southern District of Texas on September 19, 2003. Judge Rainey granted summary judgment against him on July 15, 2005. Baranowski filed a notice of appeal on August 3, 2005, and briefing to this Court was completed on March 13, 2006.

Baranowski changed his official religious affiliation within TDCJ from "Jewish" to "none" on September 28, 2006, but apparently neither he nor TDCJ notified the Court of this fact. *See* attached Declaration of Bob Moore at ¶5.On May 4, 2007, this Court issued its opinion, unaware of Baranowski's change of religious affiliation. Intervenors first became aware of Baranowski's lawsuit when the Court issued its opinion.

While it was briefing this appeal, TDCJ was defending a separate lawsuit seeking a kosher diet for observant Jewish prisoners, *Moussazadeh v. Texas Department of Criminal* Justice et *al.,* No. 9:05-cv-197, E.D. Tex. (filed Oct. 11, 2005). The Eastern District of Texas stayed *Moussazadeh* on. April 4, 2006, based on TDCJ's indication that it would consider providing kosher food to Jewish inmates. *See* Ex. A. Since that time, the parties in the *Moussazadeh* case have worked slowly towards a settlement based on TDCJ's provision of kosher food to observant Jewish prisoners. TDCJ has now set up a kosher kitchen at the Stringfellow Unit outside Houston, determined which Jewish prisoners are kosher–observant, and transferred most of those 30 prisoners to the Stringfellow Unit.[1] *See* Exs. B and C. As part of its more recent efforts to provide religious accommodations to observant Jewish prisoners, TDCJ is also providing weekly Sabbath services to Jewish prisoners at the Stringfellow Unit. *See* Ex. C.

TDCJ's actions and submissions to the District Court for the Eastern District of Texas in the *Moussazadeh* case indicate that many of the main facts relied on by this Court in the May 4 opinion were simply false at the time the Court relied on them. For example, TDCJ documents show that the cost of setting up a kosher kitchen at Stringfellow has been $8,066.26, rather than the larger amounts hinted at in the affidavit of Billy Pierce dated

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1 Baranowski was presumable not eligible for transfer because he had already changed his official religious affiliation from "Jewish" to "none" by the time of the transfers earlier this year.

October 22, 2004 ("Pierce Affidavit") and relied on heavily by the Court in its May 4 opinion. *See* Ex. D, p. 7. Moreover, the draft kosher menu submitted by TDCJ as evidence in a hearing last month in Tyler before Magistrate Judge Guthrie indicates that pre-packaged kosher meals will cost at most $2.99, rather than the $15 referred to in the Pierce Affidavit.[2] *See* Ex. E. Finally, TDCJ's concern that providing a special religious diet to some prisoners would make other prisoners resentful—a concern relied on by this Court in the May 4 opinion—is now moot since TDCJ is already providing kosher food to observant Jewish prisoners at the Stringfellow Unit. And so far TDCJ has only had to set up one kitchen rather than the several claimed in the Pierce Affidavit. *See* Ex. C. TDCJ is also in the process of changing its Jewish religious accommodation policies in other ways, creating "Enhanced Jewish Designated Units" and "Basic Jewish Designated Units." *See* Ex. F.

The Court thus has before it an appeal by a prisoner who is no longer Jewish seeking accommodations for Jewish prisoners that TDCJ has already begun providing to its prisoners who are actually Jewish.

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2 Pierce's conclusions were, from the face of his affidavit, based on hearsay from the Florida Department of Corrections rather than any independent investigation.

ARGUMENT

Under FIFTH CIR. R. 40.2, "[a] petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. *Id.* Here, errors of fact—that Baranowski is Jewish and that TDCJ cannot provide certain Jewish religious accommodations—were the primary bases for the Court's decision. Those errors of fact led to errors of law. Specifically, the appeal should have been dismissed for lack of jurisdiction once Baranowski stopped claiming to be Jewish, since he lost standing to bring that claim at that time. Now that the Court is aware of that fact, it should vacate its opinion and the district court's opinion. Moreover, the relief sought by Baranowski—a kosher diet and Sabbath services—are now being given to observant Jewish prisoners in TDCJ. His appeal has therefore been moot since TDCJ began providing those accommodations earlier this year.

A. Baranowski Has Lacked Standing Since September 2006

Baranowski has not had the requisite standing to maintain any of his claims since September 2006, when he changed his official religious affiliation from"Jewish" to "none." A prisoner who no longer claims to be Jewish cannot bring Free Exercise, Equal Protection, or RLUIPA claims based on how Jewish prisoners are treated by the Texas Department of Criminal Justice ("TDCJ"). "To have Article III standing to pursue an alleged violation of the Free Exercise Clause, a plaintiff must allege that his or

her own 'particular religious freedoms are infringed.'" "*Littlefield v. Forney Indep. Sch.* Dist., 268 F.3d 275, 292 n.25 (5th Cir. 2001) (quoting Sch. *Dist. of Abington* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963)) (other citation omitted). Baranowski's lack of standing since at least September 2006 deprives this Court of jurisdiction over the entire appeal because all of his claims were predicated on his claimed Jewish religious beliefs.

B. TDCJ's Recent Accommodations Moot the Appeal

As described above, TDCJ has, since briefing on this appeal was completed in March 2006, begun to provide to observant Jewish prisoners the religious accommodations that Baranowski sought in this appeal. By beginning to make these accommodations, TDCJ has rendered all or part of the appeal moot.

In addition, it is clear that most of the facts the Court relied on were simply false—TDCJ can create a kosher kitchen, it can provide weekly Sabbath services, it can provide a kosher menu at low cost, and it won't disrupt the running of the prison systems for some prisoners to receive special religious diets. Thus even if the appeal is not entirely mooted by TDCJ's accommodations, the Court should grant the petition for rehearing to ensure that a correct factual record underlies its opinion, and to correct the conclusions of law based on the erroneous facts already presented to it.

CONCLUSION

This Court lacks jurisdiction over this appeal. Since this Court's mandate has yet to issue, it retains the ability to determine its jurisdiction over the appeal. *See*, e.g., Brotherhood *of Railroad Trainmen v. Central of* Ga. Ry. Co., 243 F.2d 793, 793 (5th Cir. 1957) (per curiam) (upon suggestion of mootness, Fifth Circuit vacated both its own judgment and the District Court's).

For the foregoing reasons, Intervenors respectfully request that the Court grant the Petition for Panel Rehearing, vacate its May 4 opinion and the district court's judgment, and dismiss the appeal for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I have this 18th day of May 2007 served a true and correct copy of the above and foregoing upon the following persons by placing the same in the U.S. Mail, with sufficient first class postage to assure delivery and addressed as follows:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS H. BARANOWSKI	§	
	§	
Plaintiff-Appellant,	§	No. 05-20646
	§	
and	§	
	§	
ALEPH INSTITUTE	§	
	§	DECLARATION
and	§	OF BOB MOORE
	§	IN SUPPORT OF
JEWISH PRISONER	§	MOTION TO
SERVICES INTERNATIONAL	§	INTERVENE
	§	
Intervenor-Appellants,	§	
	§	
v.	§	
	§	
CHAPLAIN LARRY	§	
HART, et al.,	§	
	§	
Defendants-Appellees.	§	

1. My name is Bob Moore. I am an employee of the Aleph Institute, whose offices are at 9540 Collins Avenue, Miami, Florida 33154-7127. I have personal knowledge of all of the contents of this declaration.

2. The Aleph Institute is a not–for–profit, national Jewish educational, humanitarian and advocacy organization founded in 1981 by Rabbi Sholom D. Lipskar at the direction of Rabbi Menachem M. Schneerson, the Lubavitcher Rebbe, of blessed memory. Aleph helps Jewish prisoners and their families maintain essential connection to each other and to their spiritual heritage, and provides educational materials to children of Jewish prisoners, counseling to spouses, parents and children, and financial assistance to families in need. Accordingly, Aleph has a direct interest in how Jewish religious practice is treated in state and federal prisons.

3. In furtherance of this mission, Aleph cooperates with TDCJ, by providing certain kosher items to Jewish prisoners in TDCJ at Jewish holidays, and by aiding TDCJ' s Chaplaincy Department in determining whether prisoners are Jewish, and what religious accommodations to provide Jewish prisoners.

4. In conjunction with our ministry to Jewish inmates, the Aleph Institute maintains a list of Jewish inmates within the custody of TDCJ and other state and federal prison systems. Part of our efforts to ensure that this list is accurate involves contacting chaplaincy offices in state prisons to see what inmates have identified themselves as Jewish.

5. Mr. Thomas M. Baranowski does not presently appear on the Aleph Institute's list of Jewish inmates within the custody of TDCJ. I contacted a representative of TDCJ' s chaplaincy office to determine whether Baranowski identified himself as Jewish. I learned from the representative of the TDCJ chaplaincy office that in September 2006, Baranowski changed his religious affiliation from "Jewish" to "None."

I swear under penalty of perjury and the laws of this Court that the foregoing is true and correct.

_____

Bob Moore
May 18, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20646

THOMAS H. BARANOWSKI
Plaintiff-Appellant
v.
CHAPLAIN LARRY HART; LAWRENCE N. HOGES, Huntsville Unit Warden; TED SANDERS, Rabbi TDCJ Chaplaincy Department; BILL PIERCE, TDCJ Chaplaincy Department; DOUGLAS DRETKE, TDCJ-ID Director
Defendants-Appellees

Appeal from the United States District Court
for the
Southern District of Texas, Houston

O R D E R :

IT IS ORDERED that the motion of Aleph Institute and Jewish Prisoner Services International to intervene on behalf of appellant is DENIED.

IT IS FURTHER ORDERED that motion of Aleph Institute and Jewish Prisoner Services International to file a petition for rehearing is DENIED.

SIGNED on June 8, 2007 in New Orleans, LA.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES CIRCUIT JUDGE

MOT-21

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No. 07-137

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

THOMAS H. BARANOWSKI,

Petitioner,

v.

LARRY HART, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF

Nine circuits have applied RLUIPA's "substantial burden" standard, and have propounded varying definitions that lead to differing results under the same federal statute. In this case, the Fifth Circuit found that a regulation that forced Baranowski to forfeit his regular Sabbath worship did not impose a substantial burden on his religious exercise. In reaching that conclusion, the court considered neither the restrictive control inherent in prisons nor the particularized effect of the regulation on Baranowski's religious exercise. Other circuits have considered analogous cases, and reached differing conclusions. The Court should grant the petition to harmonize the inconsistent standards in this area.

I. There Is No Standing Problem.

Baranowski unquestionably has standing to pursue this appeal. Standing depends upon the existence of a sufficient personal interest at the *commencement* of the litigation. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Co.*, 528 U.S. 167, 189 (2000). There is no dispute that, at the commencement of this litigation in 2003, Baranowski had suffered a redressable injury that was traceable to the defendants' conduct. *See id.* at 180-81. Even if checking a single box on a form in September 2006 evidenced a wholesale abandonment of Baranowski's desire to engage in corporate worship – which it did

not – there is no question that Baranowski had standing to bring this suit in 2003.

Neither are Baranowski's claims under RLUIPA moot. Indeed, Respondents argued as much to the Fifth Circuit panel just a few months ago. B.I.O. at 2 n.1. In addition to the arguments made there, the claims here are not moot because Baranowski may seek nominal damages to redress his past injuries. *See Smith v. Allen*, No. 05-16010, 2007 U.S. App. LEXIS 23038, at *34-35 (11th Cir. Oct. 2, 2007); Pet. App. B at 25 (noting that Baranowski seeks "unspecified damages"). Furthermore, Baranowski's claim for injunctive relief is not moot. Baranowski presently contends that he desires to meet and worship regularly on the Sabbath, as required by his religion. *See* Pet. App. A at 19. An injunction will ensure that Baranowski's current desired religious exercise is accommodated.[1] Respondents' suggestion that a temporary lapse in faith renders any claim for injunctive relief moot is untenable – Baranowski has a present interest in the enforcement of his religious rights. *Cf. Smith v. Allen*, 2007 U.S. App. LEXIS

[1] Additionally, Respondents have not shown how any change in Baranowski's claimed religious status compels a finding of mootness. To find mootness, the Court must find that meeting and worshiping on the Sabbath is no longer sincere religious exercise to Baranowski. Courts are unfit to engage in such an analysis, and have refused to do so in analogous situations. *See Kay v. Bemis*, No. 07-4032, 2007 U.S. App. LEXIS 21811, at *10 (10th Cir. Sept. 11, 2007) (noting that adjudging sincerity is "almost exclusively" a credibility determination).

23038, at *22-23 (concluding that an injunctive relief claim under RLUIPA was not moot, even though the prisoner-plaintiff was released from prison for some time during the appeal).

II. There Is Conflict Among the Circuits Warranting This Court's Intervention.

A. The Fifth Circuit Has Not Engaged in Fact-Specific Analysis to Determine Whether the Regulation Imposes a Substantial Burden on Religious Exercise.

When determining whether a regulation imposes a "substantial burden" on religious exercise, other circuits have consistently considered the regulation's particularized effect on the affected adherent. *See Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007); *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227-28 (11th Cir. 2004). The Fifth Circuit has not. *See* Pet. App. A at 19-20; *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004). Respondents attempt to minimize this conflict by suggesting that the Fifth Circuit has not "categorically rejected" the prospect of a "fact-specific inquiry to determine whether the government action or regulation in question imposes a significant burden on an adherent's religious exercise." B.I.O. at 4.

The Fifth Circuit may not have "categorically rejected" that approach, but it certainly has not consistently employed it. The panel here based the

"substantial burden" holding at issue on two observations: 1) when Baranowski was precluded from participating in group worship, no "approved religious volunteer was available to lead the services"; and 2) the panel in *Adkins* had held, regarding a similar challenge, that the adherents "were not prevented from congregating by prison policy but by the dearth of clergy and authorized volunteers." Pet. App. A at 19-20. Neither observation has anything to do with weighing the particularized impact of the outside-volunteer requirement on Baranowski's religious exercise. The first simply recognizes that the requirement was not satisfied, and the second reflects an illegitimate focus on the nature of the requirement – whether it imposes its burden directly or indirectly[2] – instead of the extent of the burden imposed.

The panel's reliance on *Adkins* is further troubling because, in that case, the panel considered the fact that the burden resulted from a rule that was a "uniform requirement for all religious assemblies" as evidence that the burden was not substantial. *See* 393 F.3d at 570; *see also id.* at 571 ("[A] government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or

---

[2] This is the direct/indirect distinction discussed in Baranowski's Petition. Pet. at 10-11. Respondents' Brief in Opposition does not address this additional error in the Fifth Circuit's "substantial burden" jurisprudence.

acting in a way that is not otherwise generally allowed."). Contrary to Respondents' argument, *see* B.I.O. at 6-8, this approach does not comport with the statute. RLUIPA is expressly designed to provide relief to inmates whose religious exercise is substantially burdened by "a rule of general applicability." *See* 42 U.S.C. § 2000cc-1(a). In suggesting that a regulation with uniform application is – for that reason – unlikely to impose substantial burdens on religious exercise, the Fifth Circuit seriously undermines the purposes of the statute. *See also, e.g.*, 42 U.S.C. § 2000cc-3(g) ("This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.").

B. The Distinction Between Prison Cases and Land-Use Cases Presents a Reason to Grant Certiorari, Not to Deny It.

Respondents argue that some of the conflicts in the circuits' "substantial burden" standards reflect a distinction between prison cases and land-use cases. B.I.O. at 4-5. As discussed further below, the conflicts are real, and it is reasonable to conclude that the burden that was found insubstantial in this case would have been found substantial in other circuits. *See* Section II(C)(5), *infra*. But it is also important to recognize that the distinction between prison cases and land-use cases highlighted by Respondents presents a reason to grant Certiorari, not to deny it.

As explained in Baranowski's petition, the Fifth Circuit's approach improperly ignores the distinction between burdens imposed on prisoners and those imposed on free persons. Pet. at 12-14. As this Court has recognized, the prison context is unique because "the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720-21 (2005). Courts should thus be wary – as the Fifth Circuit was not – of blindly importing principles relevant to land-use cases into the analysis of RLUIPA claims brought by prisoners. *See* Pet. at 12-13.

Despite the onerous nature of control in prisons, it is *more difficult* to show a substantial burden under the Fifth Circuit's prison jurisprudence than under other circuits' land-use jurisprudence. In a recent Second Circuit land-use decision, for example, the court reasoned that a lack of "ready alternatives" can be "indicative of a substantial burden" under RLUIPA. *See Westchester Day Sch. v. Vill. of Mamaroneck*, No. 06-1464, 2007 U.S. App. LEXIS 24267, at *19-20 (2d Cir. Oct. 17, 2007). It is precisely such a lack of "ready alternatives" that typically distinguishes the prison context from all others. But the Fifth Circuit's approach, embodied in its analysis in this case and in *Adkins*, does not take this critical factor into consideration. *See* Pet. App. A at 19-20; *Adkins*, 393 F.3d at 571. Because the Fifth Circuit failed to consider or account for the extent of the government's control

over inmates, the Court should grant the petition, and correct that approach.

C. The Differences Between the Circuits' Interpretation of "Substantial Burden" Are Numerous and Substantive – and Waiting for Additional "Percolation" Would Not Be Fair to Inmates Such as Baranowski.

Respondents have not shown that the circuits' differing interpretations of "substantial burden" will converge. To the contrary, the following brief survey indicates that the conflicts on this issue are numerous and substantive. Unless the Supreme Court clarifies the standard, prisoners in different areas of the country will continue to receive differing protections under the same federal statute.

1. The Circuits Differ as to Whether Generally Applicable Burdens May Be "Substantial."

As noted in Baranowski's Petition, the Fifth Circuit has held that "a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed." *Adkins*, 393 F.3d at 569-70. In the same vein, the Second Circuit explicitly cautions against adjudging a burden "substantial"

based on effect alone, because "generally applicable burdens, neutrally imposed, are not 'substantial.'" *See Westchester*, 2007 U.S. App. LEXIS 24267, at *20. Both cases rely on pre-*Smith* free-exercise cases for support. *See Adkins*, 393 F.3d 570 (citing *Lyng v. Nw. Indian Cemetery Protective Assoc.*, 485 U.S. 439, 450-51 (1988)); *Westchester*, 2007 U.S. App. LEXIS 24267, at *20 (citing *Lyng*, 485 U.S. at 451; *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 389-91 (1990)).

In contrast, the First Circuit looks to the particularized effects of regulations to find a substantial burden, even if the regulation is generally-applicable and neutrally-imposed. *See Spratt v. R.I. Dep't of Corrs.*, 482 F.3d 33, 38 (1st Cir. 2007) (finding a substantial burden when application of a prison policy did not allow the adherent to preach "anytime or anywhere"). The Third Circuit does likewise. *See Washington*, 497 F.3d at 272 (finding that a ten-book-per-week limitation imposed a substantial burden on the adherent's need to review four books per day); *cf. Parks-El v. Fleming*, 212 Fed. Appx. 245, 247-48 (4th Cir. Jan. 10, 2007) (unpublished) (holding that the adherent's contention that the prison prevented him from performing the congregational Eid-ul-Fitr prayer precluded summary dismissal on whether the prison "substantially burdened" his religious exercise).

The removal of "generally applicable" burdens from RLUIPA's ambit would dramatically reduce prisoners' religious freedoms. The statute would not

apply to prison regulations, like those found in *Spratt*, *Washington*, and *Adkins*, and would only affect individualized actions, like the suspension at issue in *Parks-El*. The plain meaning of the word "burden" does not support this distinction, and this interpretation vitiates a key purpose of the statute, as recognized by this Court. *See Cutter*, 544 U.S. at 720-21 (citing generally-applicable prison regulations as examples of how the government "exerts a degree of control [that is] severely disabling to private religious exercise").

2. The Circuits Differ as to Whether Indirect Burdens May Be "Substantial."

The Fifth and Seventh Circuits consider whether the regulation directly burdens religious exercise in determining whether the burden imposed is substantial. *See Adkins*, 393 F.3d at 571; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (holding that a burden is "substantial" if it "necessarily bears *direct*, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable") (emphasis added); *cf. Vill. of Bensenville v. FAA*, 457 F.3d 52, 63 n.3 (D.C. Cir. 2006) (holding that the government is not responsible for restraints imposed by third parties regulated by the government) (interpreting RFRA). The Ninth Circuit, in contrast, recognizes that indirect burdens to religious exercise may constitute substantial burdens. *See Warsoldier v. Woodford*, 418

F.3d 989, 996 (9th Cir. 2005) (rejecting the prison's contention that any actions on the part of the prison did not constitute a "substantial burden" because the adherent was not "physically forced" to restrain from religious exercise) (citing *Sherbert* and *Thomas*).

As explained in the petition, *see* Pet. at 10-11, the indirect/direct distinction is neither legitimate nor helpful, and conflicts with analogous precedent from this Court. As a result, the Court should grant Certiorari to correct this approach.

3. Some Circuits Allow Inquiry into the Centrality of the Religious Exercise.

The Eighth Circuit held that inquiry into the centrality of the burdened religious exercise is relevant in determining whether a burden is substantial. *See Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir. 2004). More recently, the Fourth and Eleventh Circuits have suggested that the "necessity" of the exercise is still relevant in determining whether a burden is substantial. *See Smith v. Allen*, 2007 U.S. App. LEXIS 23038, at *55-56, 62 (considering that the adherent had "presented no evidence that a small quartz crystal was *fundamental* to his practice of Odinism," and that third party sources did not indicate that "a small quartz crystal is *necessary* to observe the rites of Odinism" or "the *necessity* of a pine fire" in determining that the burden on religious exercise was incidental, not substantial) (emphasis added); *Parks-El*, 212 Fed. Appx. at 247 ("[T]he fact

that a particular practice is . . . mandated is 'surely relevant' in determining whether the burden is substantial.").

The Fifth Circuit, however, has noted that RLUIPA bars inquiry into the centrality of the religious exercise. *See Adkins*, 393 F.3d at 570 ("We emphasize that no test for the presence of a 'substantial burden' . . . may require that the religious exercise that is claimed to be thus burdened be central to the adherent's religious belief system."). Thus, even though religious exercise under RLUIPA is defined as "any exercise of religion, whether compelled by, or central to, a system of religious belief," the circuits still conflict as to whether a centrality inquiry is relevant or proper in finding a "substantial burden" under RLUIPA. 42 U.S.C. § 2000cc-8(7)(a).

4. Circuits Differ as to When a Burden Becomes "Substantial."

The Ninth and Eleventh Circuits have recognized that the Seventh Circuit's test for a substantial burden is more onerous than their own. *See Guru Nanak Sikh Society v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (rejecting Defendant's view that the Ninth Circuit had adopted the "narrower" definition of the Seventh Circuit) (quoting *Civil Liberties of Urban Believers*, 342 F.3d at 761 ("[A] land-use regulation . . . imposes a substantial burden on religious exercise [if it renders] religious exercise . . . effectively impracticable")); *Midrash Sephardi*, 366 F.3d at 1227

(declining to adopt the Seventh's Circuit definition). The Seventh Circuit's requirement that religious exercise be rendered "effectively impracticable" unreasonably limits the ambit of the statute. The Eleventh and Ninth Circuits' refusal to adopt the Seventh Circuit's standard indicates that, contrary to Respondents' assertion, the definition of substantial burden is not converging.

5. The Differences in Interpretation Have Led, and Will Lead, to Differences in Result.

The differences adverted to above have led to differing results in comparable cases. In *Orafan v. Rashid*, the district court granted summary judgment because the prison's refusal to provide a congregate Jumah service led by a Shiite prayer leader, instead of the then-provided unified-Muslim service led by a Sunni prayer leader, did not constitute a "substantial burden" under RLUIPA. 411 F. Supp. 2d 153, 156, 159 (N.D.N.Y. 2006). A Second Circuit panel reversed, noting "unresolved issues of material fact relevant to . . . the burden that the denial of a Friday congregate prayer service placed on plaintiffs' religious exercise." *Orafan v. Rashid*, No. 06-2951, 2007 U.S. App. LEXIS 22902, at *2-3 (2d Cir. Sept. 28, 2007) (unpublished). In *Washington v. Klem*, as a matter of policy, the prison limited each prisoner to possessing ten books at a time. The Third Circuit found that this policy imposed a substantial burden on the adherent's religious requirement to read four Afro-centric books

each day. *See* 497 F.3d at 275, 282. Finally, in *Parks-El*, the Fourth Circuit reversed the district court's finding that the adherent had not adequately pleaded a cause of action under RLUIPA, noting that (1) the adherent identified a specific religious practice – a particular form of congregational worship – and (2) he asserted that the prison's actions forced him to refrain from that practice, in violation of his faith. *See* 212 Fed. Appx. at 247-48.

In *Orafan*, *Washington*, and *Parks-El*, the courts looked to the particularized effect of the prison's actions to determine whether the adherent showed a substantial burden on his religious exercise.[3] The Fifth Circuit did not do so here, and thereby did not afford Baranowski the same religious protections provided by the Second, Third, and Fourth Circuits. The contrast of *Baranowski* with *Orafan* and *Parks-El* is particularly striking, because the adherent in each case sought various forms of group worship, yet the panels came to opposite conclusions. The Court should not permit these issues to percolate while inmates subject to the Fifth Circuit's jurisprudence are denied the "broad protection of religious exercise" that RLUIPA was designed to afford them. *See* 42 U.S.C. § 2000cc-3(g).

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[3] As explained in the petition, the same analysis applies to *Spratt* and *Lovelace*. *See* Pet. at 8.

CONCLUSION

For all of the reasons above, Baranowski requests that the Court grant his petition.

Respectfully submitted,

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